CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 719

W. DANIEL PINKERTON AND WALTER G. PINKERTON, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 4, 1946.

CERTIORARI GRANTED MARCH 4, 1946.

INDEX.

	PAGE
Organization of Court	1
Indictment	2
Demurrer of Defendants to Indictment, Overruled and Exception of Defendants thereto	13
Plea in Abatement	16
Plea "A" in Abatement as to Count Eleven of the Indictment	18
Demurrers of United States to Plea "A" Interposed to Count 11 of the Indictment	19
Order dated 4/30/45 Overruling Defendants' Demurrer, sustaining Plea in Abatement as to Counts 1, 2 and 4, and sustaining United States Demurrers to Defendants' Plea "A" Interposed to Count 11	25
Court Record	27
Arraignment of Defendants and Plea of Not Guilty	28
Jury selected, impaneled and Sworn	30
Order of Continuance	31
Verdicts	32
Judgment and Commitment of Defendant, Walter G. Pinkerton, entered 5/2/45	32
Judgment and Commitment of Defendant, W. Daniel Pinkerton, entered 5/2/45	35
Motion of defendant, W. Daniel Pinkerton to correct Date of Judgment	38
Order dated 8/27/45 denying Motion of Defendant, W. Daniel Pinkerton to correct Date of Judgment	39

INDEX—(Continued)

PAGE

Order dated 8/27/45 denying Motion—(Continued):
Temporary Commitment of Defendant, W. Daniel Pinkerton, dated 5/2/45, and Marshal's Return thereon 40

Motion of defendant, Walter G. Pinkerton to correct Date of Judgment 42

Order dated 8/27/45 denying Motion of Defendant, Walter G. Pinkerton to correct Judgment .. 44
Temporary Commitment of Defendant, Walter G. Pinkerton, dated 5/2/45, and Marshshal's Return thereon 44

Order dated 5/17/45 extending time to 7/1/45 to file Bill of Exceptions and Assignment of Errors 46
Order dated 8/13/45 that the given and refused charges be and made a part of the Bill of Exceptions, etc. 47
Order dated 8/14/45 transmitting Original Exhibits to C. C. A. 47

BILL OF EXCEPTIONS 48
Case called for trial 48
Statement of Case to Jury made by Mr. Tweedy, Counsel for Defendants 48
Objection of the Govt. to the Statement made by Counsel for Defendants, sustained and exception of defts. thereto 49
Further Statement made by Mr. Tweedy, Counsel for Defendants 49
Objection of the Govt. to further statement made by Counsel for Defendants, sustained and exception thereto 50

INDEX—Continued.

	PAGE
Bill of Exceptions—(Continued):	
Evidence for the Government:	
Testimony of H. G. Mitchell	50
Objections of defendants to certain questions asked the witness Mitchell, overruled and exception thereto	51
Exhibit (not marked)—Photostat of Diagram	55
Testimony of James Walter Sims	72
W. J. Blankenship	81
Belton Richard Kirkley	83
H. E. Fuller	87
A. B. Corbin	89
J. E. Pearce	90
Henry L. Darnell	91
Exhibit (not marked)—Photostat of Diagram	92
Testimony of Cornelius Porter	100
William Claude Smith	104
H. W. Liddon	107
W. P. Jordan	110
Luther Key	116
Oscar P. Romine	122
M. H. Owen	124
R. L. Moseley	128
Evidence for Defendants:	
Testimony of Jack Mansfield	132
Josie Pinkerton	134
Luther Key (Recalled)	137
Ed Nabors	139
Dewey Reynolds	141

INDEX—Continued.

	PAGE
Bill of Exceptions—(Continued):	
Evidence for Defendants—(Continued):	
Testimony of Dalton Barnes	142
Otis Kelley	143
Jim Fowler	144
Joe Cliff Gillam	146
M. L. Bolton	147
Walter Pinkerton	148
W. Daniel Pinkerton	155
Evidence for the Government (In Rebuttal):	
Testimony of Oscar P. Romine (Recalled)	170
W. P. Jordan (Recalled)	170
Charge of the Court	173
Objections of Defendants to Charge of the Court	194
Further Charge of the Court	195
Order approving Bill of Exceptions	197
Certain Charges requested by Defendants and Given	197
Certain Charges requested by Defendants and Refusal thereon	207
Notice of Appeal	215
Assignments of Error	218
Bail Bond of Defendant W. Daniel Pinkerton	236
Bail Bond of Defendant Walter G. Pinkerton	238
Clerk's Certificate	241
Proceedings in U. S. C. C. A., Fifth Circuit	242
Minute entry of submission	242
Opinion, Kennamer, J.	242
Judgment	246
Petition for rehearing (omitted in printing)	247
Order denying rehearing	248
Clerk's certificate (omitted in printing)	248
Order allowing certiorari	248

Tuesday, January 9th, 1945.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ALABAMA,
JASPER DIVISION.

PLEAS had at a regular term of the District Court of the United States in and for the Jasper Division of the Northern District of Alabama, begun and held in the United States Court Rooms in the City of Jasper, in said District, on the Second Tuesday in January, it being the ninth day thereof, in the year of our Lord, One Thousand Nine Hundred and Forty-Five, and our Independence of the United States the One Hundred Sixty-ninth.

Present, Honorable T. A. Murphree and Honorable Clarence Mullins, United States District Judges, Northern District of Alabama, presiding; Honorable Jim C. Smith, United States Attorney; Raymond E. Thomason, United States Marshal; and Chas. B. Crow, Clerk.

Tuesday, April 17th, 1945.

The District Court of the United States for the Jasper Division of the Northern District of Alabama, met pursuant to adjournment: Present, Honorable T. A. Murphree and Honorable Clarence Mullins, United States District Judges, Northern District of Alabama, presiding; Honorable Jim C. Smith, United States Attorney; Raymond E. Thomason, United States Marshal; and Chas. B. Crow, Clerk.

INDICTMENT FOR VIOLATION OF ACT OF JAN. 11, 1934, KNOWN AS "LIQUOR TAXING ACT OF 1934", SEC. 267 OF TITLE 26 U. S. C. A.) AND SEC. 3450 R. S. AND SECTION 88, TITLE 18, U. S. C. A.

In the District Court of the United States for the Jasper Division of the Northern District of Alabama.

January Term, 1945.

Count One.

The Grand Jurors of the United States, duly elected, impaneled, sworn, and charged to inquire for the body of the said Jasper Division of the Northern District of Alabama, upon their oaths present:

That heretofore, to-wit, on the 7th day of October, 1939, at or near Fayette, in the county of Fayette, in the Jasper Division of the Northern District of Alabama, and within the jurisdiction of this Court, W. Daniel Pinkerton, alias Dan Pinkerton, alias W. D. Pinkerton; and Walter G. Pinkerton, alias Walter Pinkerton, alias W. G. Pinkerton, whose names are otherwise unknown to the Grand Jurors, did then and there unlawfully, knowingly and wilfully possess a large quantity, to-wit, eight pints of distilled spirits, commonly known and designated as, to-wit, whiskey, without the immediate container and containers thereof having affixed thereto a stamp denoting the quantity of such distilled spirits contained therein and evidencing the payment of all Internal Revenue taxes imposed by the laws of the United States on such spirits; that the conduct of the part... herein complained of was not then and there within any of the exceptions contained in the Liquor Taxing Act of 1934; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

Count Two.

(Sec. 3450 R. S. being Sec. 1181 of Title 26 U. S. C. A.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That at the time and place and within the jurisdiction aforesaid, the said W. Daniel Pinkerton, alias Dan Pinkerton, alias W. D. Pinkerton; and Walter G. Pinkerton, alias Walter Pinkerton, alias W. G. Pinkerton, whose names are otherwise unknown to the Grand Jurors, did then and there unlawfully remove, deposit and conceal certain commodities, namely, a large quantity, to-wit, eight pints of distilled spirits, commonly known as whiskey, for and in respect whereof a tax was then and there imposed by the laws of the United States, with intent then and there to defraud the United States of such tax and a part thereof; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

Count Three.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That heretofore, to-wit, on the 29th day of May, 1940, at or near Fayette, in the County of Fayette, in the Jasper Division of the Northern District of Alabama, and within the jurisdiction of this Court: W. Daniel Pinkerton, alias Dan Pinkerton, alias W. D. Pinkerton; and Walter G. Pinkerton, alias Walter Pinkerton, alias W. G. Pinkerton; who are hereinafter in each and every count of this indictment designated as the Defendants, and whose names are otherwise unknown to the Grand Jurors, did then and

there unlawfully remove, deposit, and conceal certain goods and commodities, namely, a large quantity, to-wit, three and three-fourths gallons of distilled spirits commonly known and designated as whiskey, for or in respect whereof a tax was then and there imposed by the laws of the United States, with intent to defraud the United States of such tax; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Count Four.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That heretofore, to-wit, on the 7th day of December, 1940, at or near Fayettte, in the County of Fayette, in the Jasper Division of the Northern District of Alabama, and within the jurisdiction of this Court: the Defendants, whose names are otherwise unknown to the Grand Jurors, did then and there unlawfully remove, deposit, and conceal certain goods and commodities, namley, a large quantity, to-wit, three pints, of distilled spirits commonly known and designated as whiskey, for or in respect whereof a tax was then and there imposed by the laws of the United States, with intent to defraud the United States of such tax; contrary to the form of the statute in such case made and provided and agains the peace and dignity of the United States.

Count Five.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That heretofore, to-wit, on the 11th day of October, 1941, at or near Fayette, in the County of Fayette, in the

Jasper Division of the Northern District of Alabama, and within the jurisdiction of this Court: the Defendants, whose names are otherwise unknown to the Grand Jurors, did then and there unlawfully remove, deposit, and conceal certain goods and commodities, namely, a large quantity, to-wit, two gallons, of distilled spirits commonly known and designated as whiskey, for or in respect whereof a tax was then and there imposed by the laws of the United States, with intent to defraud the United States of such tax; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Count Six.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That heretofore, to-wit, during November, 1942, at or near Fayette, in the County of Fayette, in the Jasper Division of the Northern District of Alabama, and within the jurisdiction of this Court: the Defendants, whose names are otherwise unknown to the Grand Jurors, did then and there unlawfully remove, deposit, and conceal certain goods and commodities, namely, a large quantity, to-wit, one gallon, of distilled spirits commonly known and designated as whiskey, for or in respect whereof a tax was then and there imposed by the laws of the United States, with intent to defraud the United States of such tax; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Count Seven.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That heretofore, to-wit, on the 17th day of December, 1942, at or near Fayette, in the County of Fayette, in the Jasper Division of the Northern District of Alabama, and within the jurisdiction of this Court: the Defendants, whose names are otherwise unknown to the Grand Jurors, did then and there unlawfully remove, deposit, and conceal certain goods and commodities, namely, a large quantity, to-wit, 19 gallons, of distilled spirits commonly known and designated as whiskey, for or in respect whereof a tax was then and there imposed by the laws of the United States, with intent to defraud the United States of such tax; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Count Eight.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That heretofore, to-wit, on the 5th day of February, 1943, at or near Fayette, in the County of Fayette, in the Jasper Division of the Northern District of Alabama, and within the jurisdiction of this Court: the Defendants, whose names are otherwise unknown to the Grand Jurors, did then and there unlawfully remove, deposit, and conceal certain goods and commodities, namely, a large quantity, to-wit, nineteen, of distilled spirits commonly known and designated as whiskey, for or in respect whereof a tax was then and there imposed by the laws of the United States, with intent to defraud the United States of such tax; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Count Nine.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That heretofore, to-wit, on the 26th day of June, 1943, at or near Fayette, in the County of Fayette, in the Jasper Division of the Northern District of Alabama, and within the jurisdiction of this Court: the Defendants, whose names are otherwise unknown to the Grand Jurors, did then and there unlawfully remove, deposit, and conceal certain goods and commodities, namely, a large quantity, to-wit, one pint, of distilled spirits commonly known and designated as whiskey, for or in respect whereof a tax was then and there imposed by the laws of the United States, with intent to defraud the United States of such tax; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Count Ten.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That heretofore, to-wit, on the 29th day of May, 1940, at or near Fayette, in the County of Fayette, in the Jasper Division of the Northern District of Alabama, and within the jurisdiction of this Court, the Defendants, whose names are otherwise unknown to the Grand Jurors, did then and there unlawfully, knowingly, and wilfully possess a large quantity, to-wit, three and three-fourths gallons, of distilled spirits; commonly known and designated as, to-wit, whiskey, without the immediate container and containers thereof having affixed thereto stamps denoting the quantity of such distilled spirits contained therein and evidencing the payment of all Internal Revenue

taxes imposed by the laws of the United States on such spirits;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Count Eleven.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That heretofore, to-wit, continuously from, to-wit, the 12th day of August, 1938, to, to-wit, the fall of 1943, and within six years of the finding of this indictment, in the County of Fayette, in the aforesaid division of the Northern District of Alabama, and within the jurisdiction of this Court, the Defendants, whose names are otherwise unknown to the Grand Jurors, did unlawfully, knowingly, and wilfully combine, conspire, confederate and agree together, with each other, and with Cornelius Porter, Eulice Porter, alias Eulus Porter, and Fred Agnew, alias Fed Agnew, the said Cornelius Porter, Eulice Porter, alias Eulus Porter, and Fred Agnew, alias Fed Agnew, not being made defendants in this indictment, and with divers and sundry other persons unknown to the Grand Jurors, to commit the acts made offenses and crimes against the United States by Sections 2810, 2833, 2834, 3321, 2803, and 3253 of the Internal Revenue Code of the United States, in this, that is to say, that at the time and place aforesaid and within the jurisdiction aforesaid, the above named Defendants did unlawfully, knowingly and wilfully conspire, combine, confederate and agree together, with each other and with divers and sundry other persons unknown to the Grand Jurors, to, separately and severally;

I. Unlawfully carry on the business of a distiller of spirituous liquors, without having given bond as required by the laws of the United States;

II. Unlawfully have in their possession and custody and under their control divers and sundry stills and distilling apparatuses for the production of spirituous liquors, set up without having the same registered as required by the laws of the United States;

III. Unlawfully engage in and carry on the business of a distiller of spirituous liquors, with intent to defraud the United States of the taxes on the spirituous liquors distilled by them;

IV. Unlawfully work in a distillery for the production of spirituous liquors and carry and deliver raw material, to-wit, sugar and yeast, to a distillery, and to divers distilleries, upon which there was no sign bearing the word "Registered Distillery";

V. Unlawfully, knowingly and wilfully transport, possess, buy, sell and transfer divers and sundry quantities of distilled spirits commonly known and designated as, to-wit, whiskey, without the immediate container and containers thereof having affixed thereto stamps denoting the quantity of such distilled spirits contained therein and evidencing the payment of all Internal Revenue taxes imposed by the laws of the United States on such spirits;

VI. Unlawfully remove, deposit and conceal certain commodities, namely, a large quantity, to-wit, 5 gallons of distilled spirits commonly known as whiskey, for and in respect whereof a tax was then and there imposed by the laws of the United States, with intent then and there to defraud the United States of such taxes;

VII. Unlawfully carry on the business of a retail liquor dealer without first having paid the special tax as required by the laws of the United States;

VIII. Unlawfully carry on the business of a wholesale liquor dealer without first having paid the special tax as required by the laws of the United States;

IX. Unlawfully make and ferment on premises other than a distillery duly authorized according to the laws of the United States, mash, the exact quantity being to the Grand Jurors unknown, said mash being then and there fit, suitable and intended for the distillation and production of spirits, to-wit, whiskey;

And the Grand Jurors aforesaid say, present and charge that it was a part and parcel of said conspiracy, combination, confederation and agreement above mentioned that overt acts in furtherance of and to effect the object of said conspiracy would be committed within the jurisdiction of this Court and at divers and sundry other places by one or more of the Defendants;

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and charge that pursuant to said conspiracy and so to effect the object thereof, one or more of the conspirators did and caused to be done in the aforesaid Division, and within the jurisdiction of this Court, certain overt acts, to-wit:

1. On or about, to-wit, August 28, 1940, the said W. Daniel Pinkerton had in his possession a rifle.

2. On or about, to-wit, October 7, 1939, the defendant, W. Daniel Pinkerton possessed eight pints of non-taxpaid whiskey contained in eight pint tax-paid whiskey bottles at his residence on his farm in Fayette County, Alabama.

3. On or about, to-wit, January 14, 1940, W. Daniel Pinkerton possessed numerous cases of empty pint tax-paid whiskey bottles and a jug labeled "Peach Syrup" and containing a small amount of syrup, which were stored in his residence and garage in Fayette County, Alabama.

4. On or about, to-wit, May 29, 1940, the defendant Walter G. Pinkerton possessed three and three-fourths gallons of non-tax paid whiskey, contained in one five gallon jacket can, one one-gallon glass jug and three pint bottles, at his residence on the W. Daniel Pinkerton farm in Fayette County, Alabama.

5. On or about, to-wit, August 28, 1940, Walter G. Pinkerton, carrying a rifle, ordered State officers who were searching the W. Daniel Pinkerton residence for whiskey to leave the premises.

6. On or about, to-wit, December 7, 1940, W. Daniel Pinkerton possessed three pints of non-tax paid whiskey mixed with Coca-Cola Syrup contained in tax paid whiskey bottles in the garage at his residence in Fayette County, Alabama.

7. On or about, to-wit, May 31, 1941, Fred Agnew possessed two gallons of non-taxpaid whiskey and sold one pint of non-taxpaid whiskey at his home in Fayette County, Alabama.

8. On or about, to-wit, May 24, 1941, W. Daniel Pinkerton was engaged in selling grain alcohol mixed with flavoring syrup and sold one pint of non-taxpaid industrial grain alcohol at his home on the Pinkerton farm in Fayette County, Alabama.

9. On or about, to-wit, October 11, 1941, the defendant, Walter G. Pinkerton possessed two gallons of non-taxpaid whiskey contained in one-gallon glass jugs in his residence on the W. Daniel Pinkerton farm in Fayette County, Alabama.

10. During, to-wit, November, 1942, Fred Agnew purchased non-taxpaid whiskey at $7.50 per gallon from Walter G. Pinkerton for resale at $1.50 per pint at his residence in Fayette County, Alabama.

11. On, to-wit, November 20, 1942, Fred Agnew possessed one gallon of non-taxpaid whiskey and sold one pint of non-taxpaid whiskey at his residence in Fayette County, Alabama.

12. On, to-wit, December 6, 1942, Walter G. Pinkerton possessed one gallon of non-taxpaid whiskey at his premises on the W. Daniel Pinkerton farm in Fayette County, Alabama.

13. On, to-wit, December 17, 1942, Walter G. Pinkerton and Eulice Porter possessed and transported nineteen gallons of non-taxpaid whiskey contained in one-gallon glass jugs in Porter's automobile in Fayette County, Alabama.

14. On, to-wit, February 5, 1943, the Defendants Walter Pinkerton and Cornelius Porter possessed and transported nineteen gallons of non-taxpaid whiskey contained in one-gallon glass jugs in Pinkerton's automobile in Fayette County, Alabama.

15. On, to-wit June 26, 1943, Walter Pinkerton possessed and sold one pint of non-taxpaid whiskey at his home on the W. Daniel Pinkerton farm in Fayette County, Alabama.

16. During, to-wit, the month of November, 1942, the Defendants carried on the business of a retail liquor dealer without first having paid the tax required by law.

All of which was and is contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

JIM C. SMITH,
United States Attorney.

A True Bill:
W. A. SHELBY,
Foreman of the Grand Jury.

Filed in open Court this 17th day of April, A. D. 1945.
CHAS. B. CROW, Clerk.

---

14. DEMURRER.

Filed April 30, 1945. Chas. B. Crow, Clerk.

In the District Court of the United States for the Jasper Division of the Northern District of Alabama.

United States,
vs.
Dan Pinkerton, et als., Defendants.

Now comes Dan Pinkerton and Walter G. Pinkerton, separately and severally, and demur to the indictment and each count thereof, separately and severally, and assign the following separate and several grounds:

1. Said count does not state an offense.

2. It is not alleged in said count that what the defendants did was unlawfully done.

3. The liquors is not sufficiently described in said count.

4. The allegations are mere conclusions of the pleader.

5. For aught that appears in said count the liquors was not fit for beverage purposes.

6. It is not alleged in said count that the liquors mentioned therein was beverage liquor or fit for beverage purposes and is no violation of the law.

7. Said count fails to allege that the defendants conspired to manufacture, sell, transport, or otherwise deal in intoxicating liquors unlawfully or for beverage purposes.

8. Said count fails to allege that the defendants unlawfully engaged in business of a distillery of spirited liquors or unlawfully and with the intent to defraud the United States of taxes of liquors distilled by them.

9. Said count fails to allege that the defendants unlawfully used or had under their control sundry stills and distilling apparatus for the production of distilled liquors and fails to allege they distilled liquors for the beverage purpose.

10. Because the transporting averred in the indictment was consistent with the conclusion that what the defendant agreed to transport or did transport was liquor not fit for use for beverage purposes and not subject to tax.

11. Because the allegations in said count are in the alternative and each alternative does not state any crime against the United States.

12. Said count does not charge that they unlawfully did the act, but only charges that they unlawfully conspired to do an act.

13. Because said count fails to allege a conspiracy to manufacture, sell; transport, or otherwise deal in intoxicating liquors unlawfully or for beverage purposes.

14. Because said count fails to allege a conspiracy to do the things and acts set forth in said count unlawfully.

15. Because said count sets forth in specifications acts and things done in support of a conspiracy which had not at that time been formed, or if it had been formed is barred by limitations on the face of the specifications.

16. Because in the specifications in said count they are barred by the Statute of Limitations.

17. Because the facts alleged in the specification to sustain the indictment are barred by the Statute of Limitations.

18. Because said count includes matters barred by the Statute of Limitations with other matters not barred by Statute of Limitations.

R. L. NEWTON,
PENNINGTON & TWEEDY,
Attorneys for Defendants.

The within Demurrer having been argued orally and submitted the same is overruled and each of the Defendants excepts.

Done this April 30, 1945.

CLARENCE MULLINS,
U. S. District Judge.

PLEA IN ABATEMENT.

16 Filed April 30, 1945.

In the District Court of the United States, Northern District of Alabama, Jasper Division.

United States
vs. No. 1203.
W. Daniel Pinkerton, Et Al.

1. Comes the defendant, W. Daniel Pinkerton, and says that he was formerly indicted in this Court on the same identical charge, same identical offense, same identical facts, as charged in Count One against him in this case, unlawfully possessing to-wit, 8 pints of whiskey, which such case was numbered 1079 J on the docket of this Court; that on to-wit, December 8, 1941, he was duly arraigned on said charge in this Court and was duly tried in this Court, and adjuged guilty of said offense and paid a fine therefor. He pleads these facts in bar of a further prosecution on the charge contained in Count One, of this indictment, he having been heretofore convicted of the same identical offense on the same identical facts and therefore has been once in jeopardy for same.

2. Comes the defendant, W. Daniel Pinkerton, and says that he was formerly indicted in this Court on the same identical facts, as charged in Count Two against him in this case, namely, removing or concealing 8 pints of whiskey; that on to-wit, December 8, 1941, he was duly tried in this Court, and adjudged guilty of said offense and paid a fine therefor. He pleads these facts in bar of a further prosecution on the charge contained in Count Two, of this indictment, he having been heretofore convicted of the

same identical facts and therefore has been once in jeopardy for same: that said facts are the same set of facts on which defendant was convicted in case #1079 of this Court.

3. Comes the defendant, W. Daniel Pinkerton, and says that he was formerly indicted in this Court on the same identical charge, same identical offense, same identical facts, as charged in Count Four against him in this case, namely, removing or concealing 3 pints of whiskey; that on to-wit December 8, 1941, he was duly tried in this Court, and adjudged guilty of said offense and duly punished therefor. He pleads these facts in bar of a further prosecution on the same charge contained in Count Four, of this indictment, he having been heretofore convicted of the same identical offense and on the same identical facts and therefore had been once in jeopardy for same.

W. DAN PINKERTON.

State of Alabama,
Walker County.

Personally appeared before me, the undersigned authority, W. Daniel Pinkerton, who being by me first duly sworn, deposes and says that the facts set forth in each of the foregoing pleas, numbered 1, 2 and 3, are true and correct as therein stated to the best of his knowledge.

W. DAN PINKERTON.

(Seal)

Sworn to and subscribed before me, this the 30th day of April, 1945.

BERTHA NICHOLS,
Notary Public.

PLEA "A" IN ABATEMENT AS TO COUNT ELEVEN OF THE INDICTMENT.

18 Filed April 30, 1945.

(Title Omitted.)

Comes W. Daniel Pinkerton and Walter Pinkerton, defendants in the above-styled cause, and say that heretofore in this Court they have been indicted for the same identical offense on the same identical facts as contained in Count Eleven of the indictment in this case, namely, conspiracy to violate the liquor and revenue laws of the United States, except that in the prior indictment limitation was alleged at three years instead of six years prior to the time the indictment was returned; that on said previous indictment, they were duly arraigned in this Court on said conspiracy charge in said indictment and pleaded not guilty thereto, and were duly tried in this Court upon said indictment; that they were convicted and voluntarily and of their own notion appealed from said judgment of conviction to the Circuit Court of Appeals, which said Court reversed their conviction and said case is now pending in this Court; that the present indictment was returned and filed after said case had been reversed; that each of these defendants have been placed in jeopardy on the matters alleged in this indictment and they plead these facts in bar on trial of Count Eleven of this indictment.

W. DAN PINKERTON,
WALTER PINKERTON.

Sworn to and subscribed before me, this the 30 day of April, 1945.

CHAS. B. CROW,
(Seal) Clerk, U. S. District Court.

DEMURRERS OF THE UNITED STATES TO PLEA "A" INTERPOSED TO COUNT 11 OF THE INDICTMENT.

19 Filed the 30th day of April, 1945.

(Title Omitted.)

Comes the United States of America and demurs to Plea No. "A" of former jeopardy or in abatement filed herein by the Defendants, and, as grounds of said Demurrers assigns, separately and severally, the following:

1. It is not sufficiently averred in said plea, except by way of conclusion of the pleader, how or in what manner the Defendants have heretofore been placed in jeopardy.

2. It is not averred in said plea, except by way of conclusion of the pleader, whether or not any final judgment of conviction or acquittal was entered in and on the former indictment.

3. From aught appearing from the allegations of said plea, the present indictment covers a period of time not included in the former indictment.

4. For aught appearing from the allegations of said plea, the trial on the former indictment resulted in the conviction of the said Defendants and the sentence of the Defendants and they voluntarily and of their own accord appealed from said conviction and sentence and secured a reversal of said conviction and sentence.

5. The allegations of said plea that the present indictment, Count 11, charges the Defendants "with same identical offense upon the same identical facts as charged in

the former indictment under which they were duly tried and for the charges therein were duly placed in jeopardy," are merely conclusions of the pleader and are insufficient to show that, upon the former indictment, there was formerly adjudicated in a Court of competent jurisdiction the guilt or innocence of the Defendants on the charge contained in Count 11 of the present indictment.

6. The facts averred in said plea are legally insufficent to constitute a bar to a prosecution under Count 11 of the present indictment.

7. The mere fact, if it be a fact, that the former indictment is still pending in this Court against the Defendants is insufficient as an abatement of Count 11 of the present indictment.

8. There is not attached to said Plea "A" a true copy of the former indictment and proceedings had in and on the former trial so that the Court upon an inspection of the same can legally determine whether or not the allegations of the present indictment are the same as those contained in the former indictment.

9. The facts averred in said plea are insufficient as a matter of law to constitute a bar to the prosecution of the Defendants under Count 11 of the present indictment.

10. The mere fact of the pendency of a former indictment, as alleged in said plea, is insufficient in law to constitute a bar to a prosecution under Count 11 of the present indictment.

11. It is not averred as to how or in what manner or by what means or ways or devices the Defendants were placed in jeopardy under the former indictment so that

any final order or judgment therein would constitute an abatement to the maintenance of a prosecution to Count 11 of the present indictment.

12. For aught appearing from the allegations of said plea the defendants were regularly tried and convicted and sentenced under the former indictment and that thereafter the Defendants prosecuted an appeal therefrom, secured a reversal of said conviction and sentence and thereby subjected themselves to a new trial under the same (old) indictment or another indictment for the same offense.

13. For aught appearing from the allegations of said Plea "A" the indictment and proceedings thereunder sought to be pleaded in bar or abatement of Count 11 of the present indictment are still pending and undisposed of.

14. From aught appearing from the allegations of said plea the indictment in the former case was invalid.

15. It is not averred in said plea that the jeopardy complained of and alleged in said plea was had upon a valid indictment.

16. The record of the Court showing how or in what manner the former indictment is still pending after the Defendants had been arraigned thereunder is not attached to said plea or made a part thereof.

17. For aught appearing from the allegations of said plea the Defendants were tried and convicted and sentenced on the former indictment and thereafter procured, on appeal, the said judgment against them to be set aside

and to cause the said case and judgment to be remanded and remitted to this Court for another trial upon that indictment or any other indictment, for the same offense, as the United States might in their discretion elect or choose to do.

18. It is not alleged in said plea with sufficient certainty whether the Defendants were tried and convicted or acquitted on the former indictment and the effect thereof except by way of conclusion of the pleader.

19. Said plea does not sufficiently allege that the former trial failed on the merits of the charges then tried and considered by the Court.

20. Facts sufficient to show that there are no facts averred in and under the present indictment and within the period of time alleged in each indictment which could have been proved as overt acts under the former indictment are not alleged in said plea with sufficient certainty.

21. The facts averred in said plea are insufficient to show that the charges and offenses alleged in the former indictment and in the present indictment are the same and identical in point of time and in substance.

22. There are no facts averred in said plea to legally and constitutionally prevent the United States from prosecuting the Defendants on the old indictment after reversal of conviction thereunder, or to prosecute them on facts growing out of the same conspiracy now averred in Count 11 of the present indictment.

23. The facts alleged in said plea do not constitute former jeopardy.

24. Former jeopardy is not shown by the facts averred in said plea.

25. It is not shown that the former indictment was valied and that the judgment rendered thereon was upon the merits and the reversal of said judgment finally and completely, in law and fact, bars and prohibits the United States from again prosecuting the defendants under Count 11 of the present indictment.

26. It affirmatively appears from the facts averred in said plea that the Defendants, having of their own volition procured a reversal of their conviction and sentence under the former indictment, are not now immune from either further prosecution upon that indictment or under Count 11 of the present indictment.

27. The mere pendency of the former indictment is insufficient to constitute an abatement to prosecution under Count 11 of the present indictment.

28. The facts averred show that the judgment rendered against the Defendants under the former indictment was reversed at the instance of the Defendants and that, upon remand of said judgment to this Court, there has not been rendered a final judgment legally determining the merits of the subject matter of the former indictment.

29. The facts averred are not sufficient to constitute an abatement of a prosecution under Count 11 of the present indictment.

30. The facts averred affirmatively show that the charges averred in Counts 11 are not barred so that the Defendants can legally escape prosecution therefrom on such grounds as are alleged in said plea.

31. The facts averred fail to constitute former jeopardy.

32. For aught appearing from the allegations of said plea neither of the Defendants has ever been finally judicially adjudged guilty or not guilty of the charge and offense charged in the former indictment because in the former appearance, after conviction and sentence therein, the procured a reversal and remand of said conviction and sentence and there are no allegations in said plea to indictate or from which it could be inferred that since such reversal and remand any final disposition has been made of that indictment or that the Defendants have been legally and judicially exonerated from the charges contained therein.

33. For aught appearing from the allegations of said plea for an abatement of or former jeopardy the Defendants were indicted in a former indictment, were tried and convicted on the same charge of conspiracy as having been committed within three years of the finding of that indictment and that upon said conviction they were sentenced and thereafter prosecuted an appeal from the judgment of conviction and sentence to the United States Circuit Court of Appeals for the Fifth Circuit, which upon consideration thereof, reversed the judgment of conviction and remanded the case to this Court for further proceedings in accordance with law and justice and not inconsistent with the ruling made in the decision of the appeal, and it, therefore, affirmatively appears that upon the Defendants procuring a reversal and remand of said case on appeal, the same was remanded to this Court for another trial upon that indictment or upon another indictment, being the one involved, as the United States of America might see fit to elect to do.

34. For it affirmatievly appears from the allegations of the said plea that the facts therein alleged do not constitute former jeopardy.

JIM C. SMITH,
United States Attorney.

The within Demurrer to Plea A is sustained.

This April 30th, 1945.

CLARENCE MULLINS,
United States District Judge.

ORDER OVERRULING DEFENDANTS' DEMURRERS, SUSTAINING PLEAS IN ABATEMENT AS TO COUNTS 1, 2, AND 4 OF DEFENDANT, W. DANIEL PINKERTON, AND SUSTAINING DEMURRERS OF THE UNITED STATES TO PLEA "A" INTERPOSED TO COUNT ELEVEN OF THE INDICTMENT.

24 Filed April 30, 1945.

(Title Omitted.)

This cause coming on to be heard on this the 30th day of April, 1945, the defendants appearing, separately and severally, in their own proper persons and by counsel, Hon. Charles Tweedy and Hon. J. J. Curtis, and the United States by Jim C. Smith, United States Attorney, the following proceedings were had and done:

1. The Defendants, separately and severally, filed a written demurrer assigning therein 18 separate and several grounds to the indictment and to each count thereof, separately and severally, and the same having been sub-

mitted and argued to the Court, and the Court understanding the same, and the Court being of the opinion that the demurrer is not well taken and should be overruled, it is, accordingly:

Ordered, Adjudged and Decreed by the Court that said demurrer be and the same is hereby overruled, to which action of the Court the defendants, separately and severally, except.

2. Thereupon, the defendant, W. Daniel Pinkerton, filed three sworn pleas in abatement or bar to Counts 1, 2, and 4 of the indictment, and the United States, through its Attorney, Jim C. Smith, confesses said pleas, thereupon, it is:

Ordered, Adjudged and Decreed by the Court that said pleas Nos. 1, 2, and 4 be and the same are each hereby sustained.

3. Thereupon, the defendants, separately and severally, filed Plea "A" to Count 11 of the indictment, and thereupon the United States filed a demurrer containing 34 separate and several grounds to said plea "A", and the said plea and said demurrer having been submitted and argued to the Court, and the Court understanding the same and being of the opinion that the demurrer is well taken to said plea "A" and should be sustained, it is, accordingly:

Ordered, Adjudged, and Decreed that the demurrer of the Unitd States to plea "A" of the Defendants be and the same is hereby sustained.

Done, this the 30th day of April, 1945.

CLARENCE MULLINS,
United States District Judge.

In the District Court of the United States for the Jasper Division of the Northern District of Alabama.

Monday, April 30th, 1945.

The District Court of the United States for the Jasper Division of the Northern District of Alabama, met pursuant to adjournment: Present, Honorable T. A. Murphree and Honorable Clarence Mullins, United States District Judges, Northern District of Alabama, presiding; Honorable Jim C. Smith, United States Attorney; Raymond E. Thomason, United States Marshal; and Chas. B. Crow, Clerk.

(Title Omitted.)

This cause coming on to be heard, this day, before the Honorable Clarence Mullins, United States District Judge, Northern District of Alabama, comes the United States of America, by District Attorney, come also the defendants, W. Daniel Pinkerton, alias Dan Pinkerton, alias W. D. Pinkerton, and Walter G. Pinkerton, alias Walter Pinkerton, alias W. G. Pinkerton, in their own proper persons, and by counsel, and the said defendants, separately and severally interpose a demurrer to the indictment and to each count thereof, separately and severally, and said demurrer being argued orally and submitted, and same being considered and understood by the Court, it is Ordered, Adjudged and Decreed that said demurrer be, and the same hereby is, overruled and denied, to which ruling of the Court, the defendants duly except.

Whereupon, the defendant, W. Daniel Pinkerton files plea of abatement to Counts 1; 2 and 4 of the indictment, which said plea is sustained by the Court.

Thereupon, the defendants, W. Daniel Pinkerton and Walter Pinkerton file plea "A" to Count Eleven of the indictment in this cause:

Whereupon, the United States demurs to the defendants' plea "A" interposed to Count Eleven of the indictment in this cause, and said demurrer being heard, considered and understood by the Court, it is hereby Ordered, Adjudged and Decreed that said demurrer be, and the same hereby is, sustained.

Thereupon, the said defendants, W. Daniel Pinkerton, alias Dan Pinkerton, alias W. D. Pinkerton, alias W. D. Pinkerton, and Walter G. Pinkerton, alias Walter Pinkerton, alias W. G. Pinkerton now being separately and severally arraigned in open Court upon the indictment pending herein against them, charging an alleged violation of The Act of Jan. 11, 1934, known as "Liquor Taxing Act of 1934" (Sec. 267 of Title 26 U. S. C. A.) and Sec. 3450, R. S., and Section 88, Title 18, U. S. C. A.—

did, on or about the 7th day of October, 1939, unlawfully, knowingly and wilfully possess a large quantity of distilled spirits, to-wit, whiskey, without the immediate containers thereof having affixed thereto a stamp denoting the quantity of such distilled spirits contained therein and evidencing the payment of all Internal Revenue taxes imposed by law, *Count One*; did then and there unlawfully remove, deposit and conceal distilled spirits on which a tax was imposed with the intent to defraud the United States of such tax, *Count Two*; did, on to-wit, the 29th day of May, 1940, remove, deposit and conceal distilled spirits on which a tax was imposed with the intent to defraud the United States of such tax, *Count Three*; did, on or about the 7th day of December, 1940, remove, deposit and conceal distilled spirits on which a tax was imposed

with the intent to defraud the United States of such tax, *Count Four;* did, on or about the 11th day of October, 1941, remove, deposit and conceal distilled spirits on which a tax was imposed with the intent to defraud the United States of such tax, *Count Five;* did, during November 1942, remove, deposit and conceal distilled spirits on which a tax was imposed with the intent to defraud the United States of such tax, *Count Six;* did, on or about the 17th day of December, 1942, remove, deposit and conceal distilled spirits on which a tax was imposed with the intent to defraud the United States of such tax, *Count Seven;* did, on or about the 5th day of February, 1943, remove, deposit and conceal distilled spirits with the intent to defraud the United States of such tax, *Count Eight;* did, on or about the 26th day of June, 1943, remove, deposit and conceal distilled spirits on which a tax was imposed with the intent to defraud the United States of such tax, *Count Nine;* did, on or about the 29th day of May, 1940, unlawfully, knowingly, and wilfully possess a large quantity of distilled spirits, without the immediate containers thereof having affixed thereto stamps denoting the quantity of such distilled spirits contained therein and evidencing the payment of all Internal Revenue taxes imposed by law; *Count Ten;* did, continuously from, to-wit, the 12th day of August, 1938, to, to-wit, the fall of 1943, unlawfully, knowingly and wilfully combine, conspire, confederate and agree together, with each other, and with divers and sundry other persons, to commit the acts made offenses and crimes against the United States by Sections 2810, 2833, 2834, 3321, 2803, and 3253 of the Internal Revenue Code of the United States, in this, that is to say, to separately and severally: carry on the business of a distiller of spirituous liquors, without having given bond as required by law; have in possession unregistered distilleries; engage in and carry on the business of a distiller of spirituous liquors, with intent to defraud the United States of tax imposed; work in and deliver raw

material to unregistered distilleries; transport, possess, buy, sell, and transfer distilled spirits, to-wit, whiskey, without the immediate containers thereof having affixed thereto stamps denoting the quantity of such distilled spirits contained therein and evidencing the payment of all Internal Revenue taxes imposed by law; remove, deposit and conceal distilled spirits on which a tax was imposed with the intent to defraud the United States of such tax; carry on the business of a retail liquor dealer without first having paid the special tax as required by law; carry on the business of a wholesale liquor dealer without first having paid the special tax as required by law; make and ferment on premises other than a distillery duly authorized according to law, mash, said mash being then and there fit, suitable and intended for the distillation and production of spirits, to-wit, whiskey, *Count Eleven—*

plead not guilty thereto as charged, and for defense throw themselves upon their country as does also the United States Attorney.

To try this cause comes a jury of good and lawful men, to-wit, C. B. McClure, Joe A. Springer, L. R. Talbut, J. C. Easterling, J. D. Coleman, H. W. White, J. M. Rucker, Lem Cash, H. C. Pearson, Howard Benefield, John Short and R. L. Bissett, being duly selected; impaneled, charged and sworn, the trial of this cause is begun.

During the introduction of the testimony, the hour of daily adjournment having arrived, the United States Attorney and counsel for the defendants consenting and agreeing in open Court, that the jury, after being duly admonished by the Court, separate for the evening, and return tomorrow morning at 9:00 o'clock, it is, therefore, by the Court,

Ordered that this cause be, and it hereby is, continued until tomorrow morning at 9:00 o'clock.

Tuesday, May 1st, 1945.

This being the day and hour to which this cause was on yesterday continued, come again the parties hereto, the United States of America, by District Attorney, come also the defendant, W. Daniel Pinkerton, alias Dan Pinkerton, alias W. D. Pinkerton; and Walter G. Pinkerton, alias Walter Pinkerton, alias W. G. Pinkerton, in their own proper persons, and by counsel; comes also the jury heretofore selected, impaneled, charged and sworn to try this cause.

During the further introduction of the testimony, the hour of daily adjournment having arrived, the United States Attorney and counsel for the defendants consenting and agreeing in open Court, that the jury, after being duly admonished by the Court, separate for the evening, and return tomorrow morning at 9:00 o'clock, it is, therefore, by the Court,

Ordered that this cause be, and it hereby is, continued until tomorrow morning at 9:00 o'clock.

Wednesday, May 2nd, 1945.

This being the day and hour to which this cause was on yesterday continued, come again the parties hereto, the United States of America, by District Attorney, come also the defendants, W. Daniel Pinkerton, alias Dan Pinkerton, alias W. D. Pinkerton, and Walter G. Pinkerton, alias Walter Pinkerton, alias W. G. Pinkerton, in their own proper persons, and by counsel, come also the jury heretofore selected, impaneled, charged and sworn to try this cause.

After the introduction of all the testimony, the argument of counsel and the oral charge delivered by the Court, the jury returned in open Court the following verdicts which were read by the Clerk of this Court in the presence of the defendants, to-wit: "We, the jury, find the defendant, W. Daniel Pinkerton guilty as charged in counts 3, 5, 6, 8, 9, 10 & 11 of the indictment. Henry C. Pearson, Foreman" and "We, the jury, find the defendant, Walter G. Pinkerton guilty as charged in counts 1, 2, 3, 4, 5, 6, 8, 9, 10 and 11 of the indictment. Henry C. Pearsn, Foreman."

---

30 JUDGMENT AND COMMITMENT.

District Court of the United States, Northern District of Alabama, Jasper Division.

United States of America
vs. No. 1203.
Walter G. Pinkerton alias Walter Pinkerton alias W. G. Pinkerton.

Criminal Indictment in eleven counts for violation of "Liquor Taxing Act of 1934" (Sec. 267 of Title 26, U. S. C. A.) and Sec. 3450 R. S.; and Section 88, Title 18, U. S. C. A.

On this 2nd day of May, 1945, came the United States Attorney, and the defendant, Walter G. Pinkerton, with aliases, appearing in proper person, and by counsel; and

The defendant having been convicted on verdict of guilty under counts 1, 2, 3, 4, 5, 6, 8, 9, 10, and 11 of the offenses charged in the indictment in the above-entitled cause, to-wit:

did, on or about October 7, 1939, possess a large quantity of whiskey in containers not bearing proper tax stamps, count 1;

did, on or about October 7, 1939, remove, deposit, and conceal a large quantity of whiskey on which a tax was imposed, with intent to defraud the United States of such tax, count 2;

did, on or about May 29, 1940, remove, deposit, and conceal a large quantity of whiskey on which a tax was imposed, with intent to defraud the United States of such tax, count 3;

did, on or about December 7, 1940, remove, deposit, and conceal a large quantity of whiskey on which a tax was imposed, with intent to defraud the United States of such tax, count 4;

did, on or about October 11, 1941, remove, deposit, and conceal a large quantity of whiskey on which a tax was imposed, with intent to defraud the United States of such tax, count 5;

did, on or about November, 1942, remove, deposit, and conceal a large quantity of whiskey on which a tax was imposed, with intent to defraud the United States of such tax, count 6;

did, on or about February 5, 1943, remove, deposit, and conceal a large quantity of whiskey on which a tax was imposed, with intent to defraud the United States of such tax, count 8;

did, on or about June 26, 1943, remove, deposit, and conceal a large quantity of whiskey on which a tax was

imposed, with intent to defraud the United States of such tax, count 9;

did, on or about May 29, 1940, possess a large quantity of whiskey in containers not bearing proper tax stamps, count 10;

did, heretofore, to-wit, continuously from, to-wit, the 12th day of August, 1938, to, to-wit, the Fall of 1943, conspire with divers and sundry persons to carry on business of distiller without giving bond and with intent to defraud the United States of tax; possess, work in, and carry raw materials to unregistered stills; transport, possess, buy, sell, and transfer whiskey in containers not bearing proper tax stamps; remove, deposit, and conceal whiskey with intent to defraud the United States of tax; carry on business of retail and wholesale liquor dealer without first having paid the special tax; make and ferment mash suitable for distillation of liquor on premises other than a registered distillery, count 11;

and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is By The Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for the period of Thirty (30) Months and fined Five Hundred ($500.00) Dollars, to stand committed, under counts 1, 2, 3, 4, 5, 6, 8, 9, and 10 of the indictment, and is hereby committed to the custody of the Attorney General or his authorized representative for the period of Two (2) Years under count 11 of the indict-

ment, the sentence of Two (2) Years imposed under count 11 to run concurrently with sentence of Thirty (30) Months imposed under counts 1, 2, 3, 4, 5, 6, 8, 9, and 10 of the indictment;

and that said defendant be further imprisoned until payment of said fine, or until said defendant is otherwise discharged as provided by law.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

CLARENCE MULLINS,
United States District Judge.

---

32 JUDGMENT AND COMMITMENT.

District Court of the United States, Northern District of Alabama, Jasper Division.

United States of America
vs. No. 1203.
W. Daniel Pinkerton, alias Dan Pinkerton alias W. D. Pinkerton.

Criminal Indictment in eleven counts for violation of "Liquor Taxing Act of 1934" (Sec. 267 of Title 26, U. S. C. A.) and Sec. 3450 R. S.; and Section 88, Title 18, U. S. C. A.

On this 2nd day of May, 1945, came the United States Attorney, and the defendant, W. Daniel Pinkerton, with aliases, appearing in proper person, and by counsel; and

The defendant having been convicted on verdict of guilty as to counts 3, 5, 6, 8, 9, 10, and 11 of the offenses charged in the indictment in the above-entitled cause, to-wit:

did, on, to-wit, May 29, 1940, unlawfully remove, deposit, and conceal a large quantity of whiskey on which a tax was imposed, with intent to defraud the United States of tax imposed thereon, count 3;

did, on, to-wit, October 11, 1941, unlawfully remove, deposit, and conceal a large quantity of whiskey on which a tax was imposed, with intent to defraud the United States of such tax, count 5;

did, on, to-wit, during November, 1942, unlawfully remove, deposit, and conceal a large quantity of whiskey on which a tax was imposed, with intent to defraud the United States of such tax, count 6;

did, on, to-wit, February 5, 1943, unlawfully remove, deposit, and conceal a large quantity of whiskey on which a tax was imposed, with intent to defraud the United States of such tax, count 8;

did, on, to-wit, June 26, 1943, unlawfully remove, deposit, and conceal a large quantity of whiskey on which a tax was imposed, with intent to defraud the United States of such tax, count 9;

did, on, to-wit, May 29, 1940, knowingly and wilfully possess a large quantity of whiskey, without the immediate container and containers thereof having affixed thereto stamps denoting the quantity of such distilled spirits contained therein and evidencing the payment of all Internal Revenue taxes imposed by law, count 10;

did heretofore, to-wit, continuously from, to-wit, the 12th day of August, 1938, to, to-wit, the fall of 1943, conspire with divers and sundry persons to carry on business of distiller without giving bond and with intent to defraud the United States of tax; possess, work in, and carry raw materials to unregistered stills; transport, possess, buy, sell, and transfer whiskey in containers not bearing proper tax stamps; remove, deposit, and conceal whiskey with intent to defraud the United States of tax; carry on business of retail and wholesale liquor dealer without first having paid the special tax; make and ferment mash suitable for distillation of liquor on premises other than a registered distillery, count 11;

and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is By The Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for the period of Thirty (30) Months, and fined One Thousand ($1,000) Dollars, to stand committed, under counts 3, 5, 6, 8, 9, and 10; and said defendant is hereby committed to the custody of the Attorney General or his authorized representative for the period of Two (2) Years and fined Five Hundred ($500) Dollars, to stand committed, under count 11 of the indictment, said sentence of two (2) Years imposed under count 11 of the indictment to run concurrently with sentence of Thirty (30) Months imposed under counts 3, 5, 6, 8, 9, and 10 of the indictment;

and that said defendant be further imprisoned until payment of said fines, or until said defendant is otherwise discharged as provided by law.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

CLARENCE MULLINS,
United States District Judge.

---

34 (Title Omitted.)

To Judge Clarence Mullins:

Comes the defendant and makes known to the Court the following facts:

That in the above-styled case the jury returned a verdict of conviction against this defendant about 9:00 o'clock p. m. on Wednesday night, May 2, 1945; that the Court orally sentenced the defendant that night; that the defendant on that night filed an appeal bond and made known his desire to appeal said case; that at the time the Judge, District Attorney, Defendants, and Defendants' Attorneys left the Courthouse in Jasper, Alabama, it was about 10:00 o'clock on said night; that your Honor, the Judge, and District Attorney spent the night in Jasper, Alabama, on that night and did not return to Birmingham where your office is located and where the office of the District Attorney is located and where the office of the Clerk of this Court is located until Thursday, May 3, 1945; that after returning to Birmingham on Thursday, May 3, 1945, your Honor then wrote or caused to be written the judgment and commitment in this case; that said judgment was not actually entered until May 3, 1945, and was not actually written up until May 3, 1945; that there was actually no entry of judgment of conviction in this case until May 3, 1945; that actually there was not filed in the office of the

Clerk of this Court any written judgment of conviction until May 3, 1945; that the District Attorney has filed a motion to dismiss the appeal filed in this cause and has attached thereto a certified copy of the proceedings in this cause; that in said certified copy of said proceedings there is a written judgment and commitment in this case which purports to be on May 2, 1945; that actually this is not the date of the entry of judgment of conviction in this case, but that the actual date of entry of judgment of conviction in this case was May 3, 1945, when your Honor returned to Birmingham; that in the written Notice of Appeal your defendant showed the date of judgment to be May 3, 1945.

Wherefore, your defendant asks that this Court correct this record to show that said entry of judgment of conviction was actually made on May 3, 1945, and that your Honor will enter any other and further order that is necessary and proper in this case to show that said entry of judgment of conviction was filed in the office of the Clerk of this Court on May 3, 1945; for general relief.

R. L. NEWTON,
CURTIS & MADDOX,
PENNINGTON & TWEEDY,
Attorneys for W. Daniel Pinkerton.

Filed May 30, 1945.

CLARENCE MULLINS,
U. S. District Judge.

---

36 (Title Omitted.)

This matter and cause coming on to be heard on the motion filed by the defendant on May 30, 1945, and upon

due consideration thereof and the oral objections of the United States Attorney, it is hereby Ordered, Adjudged and Decreed that the said motion be, and the same is, hereby denied, it appearing to the Court that the defendant was duly tried and convicted and sentenced on May 2, 1945, in this case, and that on that date a temporary commitment was issued for the commencement of his sentence, and the records of the Court show that on that date the defendant executed an appeal bond which was approved by the Court and thereafter the Marshal duly returned said commitment unexecuted, said return being dated May 2, 1945. A copy of said temporary commitment and the Marshal's return thereon being attached hereto and made a part of this decree.

Done this 27th day of August, 1945.

CLARENCE MULLINS,
United States District Judge.

---

37 TEMPORARY COMMITMENT.

In the District Court of the United States for the Jasper Division of the Northern District of Alabama.

United States
vs. No. 1203.
W. Daniel Pinkerton.

To the Marshal for the Northern District of Alabama:

Greeting:

Whereas, W. Daniel Pinkerton was brought before the District Court of the United States for the Jasper Division of the Northern District of Alabama on this 2nd day of May, 1945 on an indictment charging him with having

violated Secs. 88, T. 18 and Sec. 3321, T. 26, USCA of the laws of the United States, and the said defendant having, upon examination, been found guilty by the said Court, and sentenced to Thirty (30) Months and fined $1,000.00 to stand committed under counts 3, 5, 6, 8, 9, and 10; Two (2) Years and fined $500.00 to stand committed under count 11, said sentence under count 11 to run concurrently with the sentence imposed under counts 3, 5, 6, 8, 9, and 10

Now, therefore, you are hereby commanded to receive the said defendant into your custody and keep him temporarily in jail or other institution until the issuance of a final commitment or until the expiration of said sentence, or until he is otherwise discharged by law; and make return of how you have executed this writ, as well as how you have executed the final commitment when you shall have received it and executed the same. The said sentence imposed shall become effective as of this date.

Witness, the Honorable Clarence Mullins, Judge of the District Court of the United States.

This the 2nd day of May, 1945.

CHAS. B. CROW,
Clerk, United States District Court, Northern District of Alabama.

(Seal)

Returned Unexecuted—Defendant made an appeal bond, approved by Judge Mullins, before being committed. 5/2/1945.

RAYMOND E. THOMASON,
U. S. Marshal.
By R. H. VAUGHAN, JR.,
Chief Deputy.

Returned and filed May 3, 1945.
CHAS. B. CROW,
Clerk.

Issued May 2, 1945.

A True Copy.
CHAS. B. CROW,
(Chas. B. Crow)
Clerk. (Seal)

---

38 (Title Omitted.)

To Judge Clarence Mullins:

Comes the defendant and makes known to the Court the following facts:

That in the above-styled case the jury returned a verdict of conviction against this defendant about 9:00 o'clock p. m. on Wednesday night, May 2, 1945; that the Court orally sentenced the defendant that night; that the defendant on that night filed an appeal bond and made known his desire to appeal said case; that at the time the Judge, District Attorney, Defendants, and Defendants' Attorneys left the Courthouse in Jasper, Alabama, it was about 10:00 o'clock on said night; that your Honor, the Judge, and District Attorney, spent the night in Jasper, Alabama, on that night and did not return to Birmingham where your office is located and where the office of the District Attorney is located and where the office of the Clerk of this Court is located until Thursday, May 3, 1945; that after returning to Birmingham on Thursday, May 3, 1945, your Honor then wrote or caused to be written the judgment and commitment in this case; that said judg-

ment was not actually entered until May 3, 1945, and was not actually written up until May 3, 1945; that there was actually no entry of judgment of conviction in this case until May 3, 1945; that actually there was not filed in the office of the Clerk of this Court any written judgment of conviction until May 3, 1945; that the District Attorney as filed a motion to dismiss the appeal filed in this cause and has attached thereto a certified copy of the proceedings in this cause; that in said certified copy of said proceedings there is a written judgment and commitment in this case which purports to be on May 2, 1945; that actually this is not the date of the entry of judgment of conviction in this case, but that the actual date of entry of judgment of conviction in this case was May 3, 1945, when your Honor returned to Birmingham; that in the written Notice of Appeal your defendant showed the date of judgment to be May 3, 1945.

Wherefore, your defendant asks that this Court correct this record to show that said entry of judgment of conviction was actually made on May 3, 1945, and that your Honor will enter any other and further order that is necessary and proper in this case to show that said entry of judgment of conviction was filed in the office of the Clerk of this Court on May 3, 1945; for general relief.

R. L. NEWTON,
CURTIS & MADDOX,
PENNINGTON & TWEEDY,
Attorneys for Walter G. Pinkerton.

Filed May 30, 1945.

CLARENCE MULLINS,
U. S. District Judge.

40 (Title Omitted.)

This matter and cause coming on to be heard on the motion filed by the defendant on May 30, 1945, and upon due consideration thereof and the oral objections of the United States Attorney, it is hereby Ordered, Adjudged and Decreed that the said motion be, and the same is, hereby denied, it appearing to the Court that the defendant was duly tried and convicted and sentenced on May 2, 1945, in this case, and that on that date a temporary commitment was issued for the commencement of his sentence, and the records of the Court show that on that date the defendant executed an appeal bond which was appoved by the Court and thereafter the Marshal duly returned said commitment unexecuted, said return being dated May 2, 1945. A copy of said temporary commitment and the Marshal's return thereon being attached hereto and made a part of this decree.

Done this 27th day of August, 1945.

CLARENCE MULLINS,
United States District Judge.

---

41 TEMPORARY COMMITMENT.

In the District Court of the United States for the Jasper Division of the Northern District of Alabama.

United States
vs. No. 1203.
Walter G. Pinkerton.

To the Marshal for the Northern District of Alabama:

Greeting:

Whereas, Walter G. Pinkerton was brought before the District Court of the United States for the Jasper Divi-

sion of the Northern District of Alabama on this 2nd day of May, 1945, on an indictment charging him with having violated Sec. 88, T. 18 and Sec. 3321 T. 26, USCA of the laws of the United States, and the said defendant having, upon examination, been found guilty by the said Court, and sentenced to Thirty (30) Months and fined $500.00 to stand committed under counts 1, 2, 3, 4, 5, 6, 8, 9, and 10; Two (2) Years under count 11, said sentence to run concurrently with the sentence imposed under counts 1, 2, 3, 4, 5, 6, 8, 9, and 10

Now, therefore, you are hereby commanded to receive the said defendant into your custody and keep him temporarily in jail or other institution until the issuance of a final commitment or until the expiration of said sentence, or until he is otherwise discharged by law, and make return of how you have executed this writ, as well as how you have executed the final commitment when you shall have received it and executed the same. The said sentence imposed shall become effective as of this date.

Witness, the Honorable Clarence Mullins, Judge of the District Court of the United States.

This the 2nd day of May, 1945.

CHAS. B. CROW,
Clerk, United States District Court, Northern District of Alabama.

(Seal)

Returned Unexecuted. Defendant made an appeal bond, approved by Judge Mullins, before being committed.

This 2nd day of May, 1945.

RAYMOND E. THOMASON,
U. S. Marshal.
By R. H. VAUGHAN, JR.,
Chief Deputy U. S. Marshal.

Returned and filed May 3, 1945.
CHAS. B. CROW,
Clerk.

Issued May 2, 1945.

A True Copy.
CHAS. B. CROW,
(Chas. B. Crow)
Clerk. (Seal)

ORDER EXTENDING THE TIME FOR FILING BILL OF EXCEPTIONS AND ASSIGNMENT OF ERRORS.

42 Filed May 17, 1945.

(Title Omitted.)

It appearing to the Court in this cause that the above-named defendants filed notice of appeal to the United States Circuit Court of Appeals for the Fifth Circuit, and

It now being made known to the Court that the defendants will need additional time in which to prepare their bill of exceptions and assignment of errors, and the Court is of the opinion that such an extension of time is in the interest of justice; it is, therefore,

Ordered that the time for the filing of the bill of exceptions and assignment of errors in this cause be, and it hereby is, extended until July 1, 1945.

This the 17th day of May, 1945.
CLARENCE MULLINS,
United States District Judge.

ORDER TO AMEND BILL OF EXCEPTIONS

43 Filed August 13, 1945.

(Title Omitted.)

This cause coming on to be heard on the motion of the defendants to incorporate in the Bill of Exceptions the given charges and the refused charges, and it appearing to the Court that said charges should be made a part of the record on appeal;

It is Ordered that the given and refused charges be, and they hereby are, made a part of the Bill of Exceptions in this cause and that they be included in the record on appeal.

This the 13th day of August, 1945.

CLARENCE MULLINS,
United States District Judge.

ORDER TO TRANSMIT ORIGINAL EXHIBITS

44 Filed August 14, 1945.

(Title Omitted.)

It appearing to the Court that this cause is on appeal in the United States Circuit Court of Appeals, Fifth Circuit; and

Upon motion of the defendant the Clerk of this Court is Ordered to transmit to Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals, Fifth Circuit, the

original exhibits introduced in this cause as set out in the Bill of Exceptions, being Government's Exhibits numbered 1, 2, 3, 4, 6, 7, 8, 9, and 10, and Defendants' Exhibits numbered 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16, and jury verdict in the matter of the State vs. Walter Pinkerton, Circuit Court, Fayette County, Alabama, offered in evidence by the defendant but not admitted in evidence.

This the 14 day of August, 1945.

CLARENCE MULLINS,
United States District Judge.

---

45 BILL OF EXCEPTIONS.

(Title Omitted.)

Be it Remembered, that at a regular session of said Court, at Jasper, Alabama, on April 30, 1945, May 1, 1945, and May 2, 1945, the Honorable Clarence Mullins, Judge of said Court, presiding, present and serving are the lawful officers to serve said Court, and present Honorable Jim Smith, representing the United States, and Messrs. Charles Tweedy, Jr., and J. J. Curtis, representing the defendants, the following proceedings in the above-styled cause, not otherwise of record, were had:

Counsel for Defendants, Mr. Tweedy, in stating the case to the jury on behalf of the Defendants, made a statement, as follows:

"With reference to the cut alcohol, we expect the evidence to show you the cut alcohol involved in here all happened in the first part of 1941, the latter part of 1940

and 1939, and going back just a little further, that cut alcohol was alcohol which was bought at a registered store, authorized to sell it; and the Government tax was paid; and the Government was not beat out of tax in that respect, because the tax was paid; and it was twice the amount of tax paid on liquor. Now, these charges made against Dan were made in 1939, 1940 and 1941. He did handle some cut alcohol. He did it of his own volition; and didn't have any connection with either one of the other defendants in selling that cut alcohol. We expect the evidence to show you he did not know he couldn't sell that under the retail liquor dealers license he had."

Whereupon Counsel for the Government objected to the statement made by Counsel for Defendants on the ground that the law presumes he knows.

Whereupon, the Court sustained said objection interposed by Counsel for the Government; and Counsel for Defendants, Mr. Tweedy, then and there, in open Court, duly and legally excepted to the ruling of the Court.

Counsel for Defendants, Mr. Tweedy, in stating the case to the jury on behalf of the Defendants, made a further statement, as follows:

"We also expect the evidence to show on behalf of Dan that he had a sentence put on him for the eight pints and the three pints; that since that time he learned he couldn't sell it that way; and since that time he has not sold cut alcohol; and has not had any cut alcohol—that was in December, 1941—and further that he had an understanding with Assistant District Attorney Jack McGuire and also Judge Murphree at that time there would be no further prosecution brought against him on that stuff."

Whereupon, Counsel for the Government interposed an objection to said statement on the ground that neither one have authority under the law to make such an agreement.

Whereupon, the Court sustained said objection interposed by Counsel for the Government; and Counsel for Defendants, Mr. Tweedy, then and there, in open Court, duly and legally excepted to the ruling of the Court.

H. G. MITCHELL, a witness for Government, after being first duly sworn, testified, as follows:

46 Direct Examination.

By Mr. Smith:

"My name is H. G. Mitchell. I was formerly Sheriff of Fayette County, Alabama, from January, 1935, to January 15, 1939. During that time I became acquainted with W. Daniel Pinkerton and his brother Walter Pinkerton. The Pinkertons live about three miles west of Fayette, and their homes are about a hundred and fifty yards of each other, on a road off the Vernon-Fayette Highway about a quarter of a mile. I had a Deputy by the name of C. A. Sides. I have made investigations at the Dan Pinkerton home or Dan Pinkerton farm."

Thereupon, Counsel for the Government propounded to the witness the following question:

(By Mr. Smith):

Q. "Did you ever go out there in connection with your official duties in connection with whiskey?"

To which the witness answered

A. "Yes, sir."

Whereupon, Counsel for Defendants, Mr. Teedy, interposed an objection to said testimony on the ground it was not confined to the period involved.

Whereupon, the Court stated: "You had better confine it to the period involved."

Whereupon, Counsel for the Government stated: "There are United States decisions on that. All the cases hold where intent is involved, and it is involved here, you can go back beyond the period alleged in the indictment and show the whole transaction."

Whereupon, the Court overruled the objection interposed by Counsel for Defendants; and thereupon Counsel for Defendants, then and there, in open Court, duly and legally excepted to the ruling of the Court in overruling said objection; and moved the Court to exclude said testimony on the same ground assigned in said objection; and the Court overruled said motion; whereupon, Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

Witness continued: "During the time I was Sheriff of Fayette County I went down there and made investigations in my official capacity about whiskey on a number of occasions."

Thereupon, Counsel for the Government propounded the following question to the witness:

Q. "What did you find on those occasions, Sheriff?"

Whereupon, Counsel for Defendants, Mr. Tweedy, interposed an objection to the question on the grounds it was

incompetent, irrelevant, and immaterial; and beyond the statute of limitations; and not shown to be within the time allowed or alleged in the indictment.

Whereupon, the Court overruled said objection; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to the ruling of the Court.

To which question the witness answered, as follows:

A. "Well, the way things were being handled, the whiskey was handled, surrounding the house—"

Whereupon, Counsel for Defendants, Mr. Tweedy, moved to exclude the answer upon the grounds it was a conclusion or opinion of the witness, and invaded the province of the jury; and the Court stated, "All right."

Thereupon, Counsel for the Government propounded the following question to the witness:

Q. "Tell what you found?"

To which witness answered:

A. "I would hide and watch them make sales."

Thereupon, Counsel for the Government propounded to the witness the following question:

Q. "Who was making the sales?"

Whereupon, Counsel for Defendants, Mr. Tweedy, interposed an objection to the question, on the ground it was beyond the period of the statute of limitations.

Whereupon, the Court stated: "Well, I will instruct the jury they can't be convicted under the conspiracy count on any overt act committed prior to the six years term involved in the indictment in this case. Of course, on the substantive counts, I let this testimony in on the question of intent."

Whereupon, Counsel for Defendants, Mr. Tweedy, then and there, in open Court, duly and legally excepted to the ruling of the Court.

Whereupon, Counsel for the Government stated: "The question is whether or not it had a tendency to show conspiracy."

Whereupon, the Court stated: "I will let in to show whether or not a conspiracy existed at that time and a conspiracy existed in the time involved here."

Thereupon, Counsel for the Government propounded to the witness the following question:

Q. "You said you watched sales, who was making the sales?"

Whereupon, Counsel for Defendants, Mr. Tweedy, interposed an objection to said question on the same grounds assigned to the previous question; the Court overruled the objection; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

To which question the witness answered:

A. "Daniel Pinkerton."

Whereupon, Counsel for Defendants moved to exclude said answer, upon the same grounds assigned in objection

to the question the Court overruled said motion; to which ruling of the Court counsel for Defendants, then and there, in open Court, duly and legally excepted.

Witness continued:

"Nobody was helping Pinkerton with them."

Thereupon, Counsel for the Government propounded to the witness the following question:

Q. "What kind of whiskey was he selling?"

Whereupon, Counsel for Defendants, Mr. Tweedy, interposed an objection to said question, on the ground it was incompetent, irrelevant, immaterial and illegal; the Court overrule said objection; and Counsel for Defendants, then and the , in open Court, duly and legally excepted to the ruling of the Court.

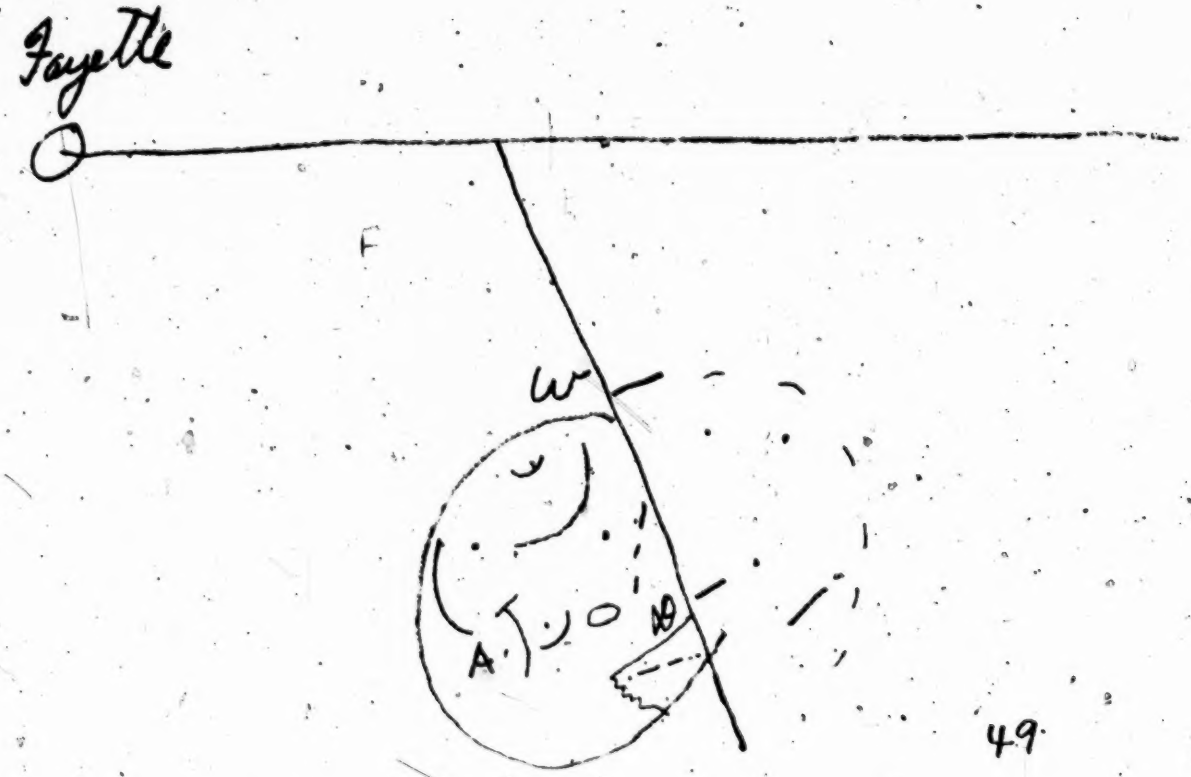
To which question the witness answered:

A. "Wildcat whiskey."

Whereupon, Counsel for Defendants moved to exclude said answer, upon the ground it was incompetent, irrelevant, immaterial and illegal; the Court overruled said motion; and to which ruling of the Court Counsel for Defendants, then and there, in open Court, duly and legally excepted.

Witness continued:

"I have seized wildcat whiskey there." (At the request of Counsel for Government the witness drew on a blackboard a diagram showing the location of the Pinkerton premises, including Walter Pinkerton's house and Dan Pinkerton's house, which diagram is copied, as follows:)



49

55

Witness continued:

"There is the Fayette highway, and that is a road that turns north; and here is Walter's house; and here is Dan's house; and the houses are sitting just off this road; and there is a pine thicket all around his house here (indicating); and out here is the barn, about a hundred yards or probably a little better; and this is a pine grove right in the yard; and the woods are back out here; and this is a cotton patch (indicating). It is on the righthand side of the road going north. There is a high hill back up here, between here and Walter's house; and woods between here and the barn, back out here. There is a cotton patch back out there. It is probably three hundred yards to the next house on the road that turns off from the Fayette Highway and passes the two Pinkerton houses on on down that road from there."

Thereupon, Counsel for the Government propounded to the witness the following question:

Q. "Now, when you decided to go down there and make an investigation, take this piece of chalk and point out on the blackboard where you all would be."

Whereupon, Counsel for Defendants, Mr. Tweedy, propounded to the witness the following questions:

(Mr. Tweedy):

Q. "Let me ask you this: your term of office ended January 15th, 1939, didn't it?"

A. "Yes."

Q. "What you are testifying about happened before that?"

A. "Yes, sir, it was before."

Whereupon, Counsel for Defendants, Mr. Tweedy, interposed an objection to the question last asked by Counsel for the Government on the ground it was not within the statute of limitations; the Court overruled said objection; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to the ruling of the Court.

To the question propounded to witness by Counsel for the Government, the witness answered:

A. "We would get different places. I would take a place on high points here (indicating), and several times Mr. Sides would get further up in the woods."

Whereupon, Counsel for Defendants, Mr. Tweedy, moved to exclude said answer, upon the ground it was not within the period covered by the statute of limitations; the Court overruled said motion; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

Thereupon, Counsel for the Government propounded to the witness the following question:

Q. "You said something about finding liquor, take this and point out there just where you did find it?"

Whereupon, Counsel for Defendants, Mr. Tweedy, interposed an objection to said question, on the ground it was more than six years before the finding of the indictment.

Whereupon, the Court said: "Are you talking about non-tax paid liquor?"

Whereupon, Counsel for the Government replied to the Court: "Yes, sir."

Whereupon, the Court overruled the objection interposed to the question propounded by Counsel for the Government to the witness by Counsel for Defendants; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

The witness answered the question, as follows:

A. "Well, right here by the barn was a little trail coming down there (indicating), and there was staches there, where they hollowed the ground and leaves on it."

Thereupon, Counsel for the Government propounded to the witness the following question:

Q. "Will you tell the jury how many times you found whiskey out in the thicket?"

Whereupon, Counsel for Defendants, Mr. Tweedy, interposed an objection to said question, on the ground it was more than six years before the finding of the indictment; the Court overruled said objection; and Counsel for Defendants, then and there, in open Court, duly and legally excepted.

The witness answered the question, as follows:

A. "The cases made, was a pint; and one case here by the barn; and another case is below the road where there is a broom sage patch; and they got some whiskey down here; and there was one time out above this little pine thicket, by the yard, just heavy underbrush in there, and got a pint out of that place one time; and, so far as finding wildcat liquor in the woods back by the barn, we found eight gallons in a stump hole one time; and out

further than this eight gallons, we found three gallons there in a five-gallon jug."

Whereupon, Counsel for Defendants, Mr. Tweedy, moved to exclude said answer, upon the ground it was more than six years before the finding of the indictment; was incompetent, immaterial and irrelevant; and there was no specification on that in any one of the counts in the indictment; the Court overruled said motion; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

Thereupon, Counsel for the Government propounded to the witness the following question:

Q. "I believe you said you saw Dan handling whiskey, what was that moonshine whiskey he was delivering?"

To which question the witness answered:

A. "Yes, sir."

Whereupon, Counsel for Defendants, Mr. Tweedy, interposed an objection to the question and moved the Court to exclude said answer, upon the ground it was more than six years prior to the finding of the indictment; the Court overruled the said objection and motion; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

Thereupon, Counsel for the Government propounded to the witness the following question:

Q. "What size containers would it be in?"

Whereupon, Counsel for Defendants, Mr. Tweedy, interposed an objection to the question, on the ground it

was more than six years before the finding of the indictment; the Court overruled said objection; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

The witness answered the question, as follows:

A. "Making sales, pints."

Witness continued:

"Whiskey bottles."

Thereupon, Counsel for the Government propounded to the witness the following question:

Q. "Did you ever see anybody filling up those bottles?"

Whereupon, Counsel for Defendants, Mr. Tweedy, interposed an objection to the question, on the ground that it was more than six years before the finding of the indictment; the Court overruled said objection; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

To which question the witness answered:

A. "No, sir." (The witness continued to answer without further questioning:) "Now, this cotton patch out from the barn, his house out here, and the barn, the cotton patch commenced out at this road, and come back out this way (indicating); I found eight gallons here and a ten-gallon keg in the cotton patch, and twenty-two pints, it was in a pasteboard carton."

Whereupon, Counsel for Defendants moved to exclude said answer, on the ground it was more than six years before the finding of the indictment; the Court overruled said motion; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

Thereupon, Counsel for the Government propounded to the witness the following question:

Q. "Was that tax sealed or moonshine whiskey?"

Whereupon, Counsel for Defendants, Mr. Tweedy, interposed an objection to said question, on the ground it was more than six years before the finding of the indictment; the Court overruled said objection; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

The witness answered, as follows:

A. "Moonshine whiskey."

Thereupon, Counsel for the Government propounded to the witness the following question:

Q. "And the keg you found was moonshine?"

Whereupon, Counsel for Defendants, Mr. Tweedy, interposed an objection to said question, upon the ground it was more than six years before the finding of the indictment; the Court overruled said motion; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

To which question the witness answered:

A. "Yes, sir."

Whereupon, Counsel for Defendants, moved that said answer be excluded, on the ground it was more than six years before the finding of the indictment in this case; the Court overruled said motion; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

Witness continued:

"The last search was August 12, 1938; we found ten gallons in the cotton patch, and thirty-six pints—twenty-two pints. That was all moonshine whiskey. I did not see anybody go to where that whiskey was located."

Thereupon, Counsel for the Government propounded to the witness the following question:

Q. "Do you recall any occasion when you saw anybody go to the staches you mentioned and get whiskey and make deliveries of it?"

Whereupon, Counsel for Defendants, Mr. Tweedy, interposed an objection to the question, upon the ground it was more than six years before the finding of the indictment; the Court overruled said objection; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

To which question the witness answered:

A. "Yes, sir. I can't remember the date it was, the time we got this eight gallons in the woods and this three gallons in the five-gallon can down next to the barn, I was up on this hill between Walter's and Dan's, the Deputy was back up here, and after I had been there something like an hour, I heard somebody running through the woods; I come over this hill, and I met Daniel just be-

fore he went into the house, and he had a gallon jug up under his arm; and, of course, he throwed it down and all the whiskey run out except probably a table spoon full. It smelled like whiskey."

Whereupon, Counsel for Defendants moved to exclude the answer, upon the ground it was more than six years before the finding of the indictment; the Court overruled said motion; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

Thereupon, Counsel for the Government propounded the following question to the witness:

Q. "What kind of whiskey was that?"

Whereupon, Counsel for Defendants, Mr. Tweedy, interposed an objection to said question, upon the ground it was more than six years before the finding of the indictment; the Court overruled said objection; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to the said ruling of the Court.

To which question the witness answered:

A. "Moonshine whiskey."

Whereupon, Counsel for Defendants, moved that said answer be excluded, on the ground that it was more than six years before the finding of the indictment in this case; the Court overruled said motion; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

Thereupon, Counsel for the Government propounded the following question to the witness:

Q. "You said you had seen sales made, were they made from down in the thicket or up at the house?"

Whereupon, Counsel for Defendants, Mr. Tweedy, interposed an objection to said question, upon the ground it was more than six years before the finding of the indictment; the Court overruled said objection; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

To which question the witness answered:

A. "The thicket and near the house."

Whereupon Counsel for Defendants moved that said answer be excluded, upon the ground that it was more than six years before the finding of the indictment; the Court overruled said motion; and Counsel for Defendants, then and there, and in open Court, duly and legally excepted to said ruling of the Court.

Witness continued:

"Daniel is the one I saw making the sales."

Thereupon, Counsel for the Government propounded the following question to the witness:

Q. "Now, did you ever make a raid there on some occasion and find approximately a hundred empty whiskey bottles that had at one time contained tax-paid whiskey?"

Whereupon Counsel for Defendants, Mr. Tweedy, interposed an objection to said question, upon the ground that it was more than six years before the finding of the

indictment; the Court overruled said objection; and Counsel for Defendants, then and there, and in open Court, duly and legally excepted to said ruling of the Court.

To which question the witness answered:

A. "Yes, sir."

Whereupon, Counsel for defendants, moved that said answer be excluded; the Court overruled the motion; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

Witness continued: "We found a 10-gallon keg right back of the barn."

Thereupon Counsel for the Government propounded the following question to the witness:

Q. "What did it smell like?"

Whereupon Counsel for Defendants, Mr. Tweedy, interposed an objection to said question, upon the ground that it was more than six years before the finding of the indictment; the Court overruled said objection; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

The witness answered said question, as follows:

A. "Wildcat whiskey."

Whereupon, Counsel for Defendants moved that said answer be excluded on the same grounds assigned in objection to said question; the Court overruled said motion; and Counsel for the Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

Witness continued: "It is probably a hundred and fifty yards from Walter's house to Dan's house. I have seen Walter at Dan's house on several occasions, during the time I was Sheriff up there. I know Fred Agnew. At that time he lived some three miles from the Pinkertons. I have been down to Fred Agnew's house on several occasions. I saw Walter Pinkerton down there one time, but don't recall just when it was. The road that turns off the Fayette Highway there and passes the two Pinkerton houses goes up the Sipsey bottom all the way to Winfield. Daniel lives a little better than a quarter down this road. It is a good gravel road; and where it turns off to go into Daniel's yard, it showed to be more travel up in the yard, the main travel turned in, where the cars traveled it had a big cutout."

Thereupon Counsel for the Government propounded to the witness the following question:

Q. "Did you ever see any cars out at Dan Pinkerton's house?"

Whereupon, Counsel for Defendants, Mr. Tweedy, interposed an objection to said question, on the ground that it was not limited to the time of the statute of limitations; the Court overruled said objection; and Counsel for Defendants, then and there in open Court, duly and legally excepted to the said ruling of the Court.

To which question the witness answered:

A. "Yes, sir."

Whereupon, Counsel for Defendants moved that said answer be excluded; the Court overruled said motion; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

Witness continued:

"Those cars were stopped in his yard."

Thereupon, Counsel for the Government propounded to the witness the following question:

Q. "How long did they stay there?"

Whereupon, Counsel for Defendants, Mr. Tweedy, interposed an objection to said question, upon the ground that it was more than six years before the finding of the indictment; the Court overruled said objection; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

To which question the witness answered:

A. "Just a few minutes."

Whereupon, Counsel for Defendants moved that said answer be excluded; the Court overruled said motion; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

Thereupon, Counsel for the Government propounded to the witness the following question:

Q. "Did you see Dan take anything to a car while you were there, deliver anything to a customer?"

Whereupon, Counsel for Defendants, Mr. Tweedy, interposed an objection to said question, upon the ground that it was more than six years before the finding of the indictment in this case; the Court overruled said objection; and Counsel for Defendants, then and there, in open

Court, duly and legally excepted to said ruling of the Court.

To which question witness answered:

A. "Yes, sir, occasionally."

Whereupon, Counsel for Defendants moved that said answer be excluded; the Court overruled said motion; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

Thereupon, Counsel for the Government propounded the following question to the witness:

Q. "What did it look like he delivered?"

Whereupon, Counsel for Defendants, Mr. Tweedy, interposed an objection to said question, upon the ground it was more than six years before the finding of the indictment; the Court overruled said objection; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

To which question the witness answered:

A. "I would see him make a trip to the car and back out to the thicket and then back to the car; of course, to see anything else, I couldn't see that."

Whereupon, Counsel for Defendants moved that said answer be excluded; the Court overruled said motion; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

Witness continued:

"I mean I couldn't tell what was in the bottle. He would go to a car and out to the thicket where I found moonshine liquor on various occasions and back to the car. I am at present a policeman in the City of Fayette."

Cross Examination.

By Mr. Tweedy:

Witness testified on Cross Examination, as follows:

"My term of office ended more than six years before April, 1945."

Whereupon, Counsel for the Government stated: "I will admit all he testified to happened between January 15, 1935, and January 15, 1939."

Witness continued:

"The eight gallons I spoke of finding was about two hundred and fifty or three hundred yards from his barn. I couldn't say it was off his land; I don't know where the line was. I can't recall whether it was just on the inside or out of his pasture there. I didn't put him under custody right at the time I saw him drop the gallon jug. I think that later a case was made against Dan, and was nol prossed. This ten gallons I spoke of finding about a hundred yards from his barn was not off his land, it was in his cotton patch. I didn't testify on the other case it was in a potato patch; I didn't testify out northeast of his house there is a potato patch where we found a 10-gallon keg of whiskey; I testified in the cotton patch. I can read."

Thereupon, Counsel for Defendants, Mr. Tweedy, stated: "I offer his testimony in the case before, where it says, "Out northeast of the house about 100 yards there is a potato patch where we found a 10-gallon keg of whiskey of whiskey."

Whereupon, Counsel for the Government interposed an objection, upon the ground that that is not the stenographer's notes by question and answer.

Whereupon, the Court stated: "I sustain it for the present, until you get the official transcript."

Witness continued: "Between Walter's house and Dan's house there is a high hill. You can't see one house from the other house. The only whiskey I am talking about is what I saw around Dan's house. Fred Agnew lived three miles or better from there, across the highway, across the ridge back over there. I saw Walter at Fred Agnew's one time; I never saw Dan over there. Eulus Porter lives three and three-quarters or four miles from the Pinkertons. Cornelius Porter lives about the same distance from there. Cornelius and his brother live right close together. I never saw Eulus Porter or Cornelius Porter at Walter Pinkerton's house, and never saw Cornelius with him. The only thing I have seen is what I testified I saw Dan doing. I was in a hundred yards of Dan's house when I saw those things, sometimes further; and I didn't have a spyglass."

Re-Direct Examination.

By Mr. Smith:

Witness continued: "I have known Dan Pinkerton since 1931. I know Dan came out to the thicket and got something and went to a car parked in his yard, and that hap-

pened frequently. The transaction about the broken gallon jug was nol prossed by the Solicitor, not me. Mr. Peters was County Solicitor and Still Hunter Circuit Solicitor. In making those cases, I never carried Daniel in but one time. When I went to make a case, I would tell him I was making a case, and he would come up and make bond. Most of them were nol prossed.'

Thereupon, Counsel for the Government propounded to the witness the following question:

Q. "Did he plead guilty in some?"

Whereupon, Counsel for Defendants, Mr. Tweedy, interposed an objection to said question, upon the grounds it was incompetent, irrelevant and immaterial, and was not within the statute of limitations; the Court overruled said objection; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

To which question the witness answered:

A. "Yes, sir, he settled off one of them."

Whereupon, Counsel for Defendants moved that said answer be excluded; the Court overruled said motion; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

Witness continued:

"I don't remember which particular case he settled or paid off."

Re-Cross Examination.

By Mr. Tweedy:

Witness continued: "Dan wasn't at home the day I found the ten gallons out in the cotton patch. That case was nol prossed."

JAMES WALTER SIMS, a witness for the Government, after being first duly sworn, testified as follows:

60 Direct Examination.

By Mr. Smith:

"My name is James Walter Sims."

Thereupon, at this point, the Court stated to the jury: "Gentlemen of the jury, at this time I will say to you in regard to this evidence that has been offered by the first witness, Mr. Mitchell, that the defendants in this case could not be convicted on the basis of that evidence constituting any overt act in this case. That evidence was permitted solely for the purpose of what bearing it might have on the intention of these defendants in connection with these transactions, and for the purpose of showing whether or not a conspiracy existed between them back at that time; but they could not be convicted of the conspiracy, nor on the substantive counts, on the basis of those particular transactions that have been testified to."

Witness continued:

"I now work on the police department of the City of Fayette. I have known Daniel Pinkerton and Walter Pinkerton ten or fifteen years. I do not remember when Dan Pinkerton built the home where he lives now and

lived in 1935 or 1936., After he built it, there was another one built that Walter occupied. In my judgment the two houses are from two hundred to two hundred and fifty yards apart. I remember an occasion when I went down to Dan Pinkerton's home with Dalton Barnes in a truck.. I don't remember exactly when it was, but believe it was in 1940 or 1939. My recollection is it was some time in May. Barnes on that occasion bought two pints of moonshine whiskey from Dan Pinkerton and paid him six bits a pint for it, or $1.50 for the two. Dan Pinkerton is in the Courtoom; he is on this end, the baldheaded one. About a year after that I went back to Daniel Pinkerton's home with Kilby White in a car; and on that occasion White got a pint of moonshine whiskey from Daniel Pinkerton; for which he paid Pinkerton seventy-five cents. That whiskey was in a pint bottle; and the bottle had no tax-paid stamp on it; it was in a plain white bottle, with no labels on it. During the year 1939 I was Deputy Sheriff in Fayette County, under Sheriff W. P. Jordan. I don't recall just how many raids we made at the Pinkerton farm while I was Deputy Sheriff. On one occasion we were up on a hill kind of south of Dan's house; and cars kept coming in and going out. There were five or six cars. I eased down on a little pathway going out from the house. There were some bushes, and I got in the bushes; and he passed me and went to a stump hole about ten steps past me. He reached in the stump hole and came out with two pints; and I heard some more bottles rattle. When he came back by me, I stopped him, and he had two pints in his hands. It was corn whiskey or wildcat whiskey. It was in tax-paid bottles, with labels on them, but no seals on them. We went to the place he had been and got six more pint bottles of moonshine whiskey in tax paid bottles; it was not tax-paid whiskey he was getting out of that stump. We arrested him for that case, and he pleaded guilty and paid off in Circuit Court.

That was in the latter part of 1939. Fayette County was a dry county at that time. Sometime about January 14, 1940, in company with Sheriff W. P. Jordan and Chief Deputy Luther Key, I went back down there. We were up on the hill. A couple of cars came in and left; and another one drove up; he came out to the car and turned and went back into the house; so I come off the hill and went into the kitchen and into the garage; and he was pouring some out of a gallon black jug into a pint bottle. I made for him, and he run around his car, which was in the garage, and he was pouring it out. At that time Deputy Key came in; so he threw this bottle over the car and almost hit Mr. Key as he come in the door. That appeared to be alcohol. We didn't make any case on that. About May 29, 1940, I went to Walter Pinkerton's house with Messrs. Jordan, Key, Blakenship and Pearce; and we found a jacket can about 150 yards east of his house which had about two gallons and a half of wildcat whiskey in it, and we went back to the house and went south of the house, at the edge of the yard, and found a gallon in a clear jug and we found two pints, and that was moonshine whiskey; then we went up on the side of the hill about 150 yards from his house and found some five gallon containers in a hole in the ground that had had whiskey in them, but there was none in them then. They smelled like whiskey. Walter wasn't there on the trip; he drove up in the yard in a car with Jim Fowler, and he had a quart and a half of bonded whiskey, tax-paid whiskey in the car. We made a case against him in State Court about the bonded whiskey; I don't know what happened to it in Court. There was a trail between Walter's house and where we found the whiskey east of his house and where those jugs were, which looked to be recently traveled. During the time I was Deputy Sheriff down there I saw Dan and Walter associating with each other often. Sometime in the latter part of August, 1940, I made

another investigation at Dan's place with Mr. Jordan and Mr. Key; we searched and found three pints of wildcat whiskey in his garage. I don't believe that was the occasion when I saw Dan, Walter and Lonnie Abbott together. On one occasion I saw Dan Pinkerton, Walter Pinkerton and Lonnie Abbot at the barn, sitting down out there. We went in the house and searched. I went back in the garage and was looking around, and Mr. Key and Sheriff Jordan came in the kitchen. I went in ahead of them and was searching in the garage; and I heard dan's wife holler, "Lordy, Mercy, don't do that." I run back in and when I got in there, Walter was standing at the door he come out of a livingroom with a twenty-two rifle drawed on the Sheriff. That was Dan's house. Walter said, "I'll kill the son-of-a-bitch." I know Lonnie Abbott. He was working for Dan some at that time. I don't think we found any liquor on the occasion when the gunplay took place—I don't remember. When Walter had the gun drawed on the Sheriff, the Sheriff backed out in the yard and called us out. While I was out there concealed watching Walter, Dan, and Walter Abbott, a car drove up, and Dan went down from the house where they were parked in the yard. I don't think they got anything that trip. On the occasion I was just talking about, we found a lot of empty tax-paid bottles, 10 or 12 cases in the attic of the garage. There were twenty-four bottles to the case. Sometime about December 7, 1940, with Mr. Jordan and Mr. Key, I am not positive of the date, when the garage was barred from the inside, and found three pints of wildcat whiskey in tax-paid bottles stached into the wall under some lumber. Mr. Key asked Dan to come in there. We got one bottle of it up, and he said he didn't know how it got in there. The house and garage are under one roof and a door between; it was between the wall, down against the wall where you come in the living quarters, and it was covered up. I think a case was made

against Dan in State Court for that; and I don't remember exactly, but my best recollection is he pleaded guilty to that later on. As to how many times during 1939 and 1940 I visited Daniel Pinkerton's premises and found empty five-gallon jugs and one-gallon jugs bearing the odor of whiskey, around his house and barn and premises, we went there several trips and found kegs, 10-gallon kegs, some out above his barn, some below his garden; and found a still one trip about 350 yards of his house, that looked like it had been operated about twice, a copper still that looked to be about a 30-gallon still."

Thereupon, the following proceedings took place:

(Mr. Smith):

Q. "Was there any trail leading from his house down toward the still at all?"

Mr. Tweedy:

"We move to exclude the evidence about the still; it is not shown he had any connection with it."

(Witness):

A. Well, there was a trail that went into the swamp north of it, and after you got in there on a little, you couldn't tell much about the trail."

The Court:

"I will exclude that evidence and instruct you not to consider it."

"We passed on that road by Dan's house as many as three days a week, and every time I passed there I saw cars with strangers parked there in front of his house. I know Eulus Porter and his brother Cornelius Porter. In the late fall of 1941 and during the year 1942 Walter

Pinkerton used a Packard sedan automobile. I have Eulus Porter and Walter Pinkerton in that car around Fayette there several different times. I have seen Walter Pinkerton parked in that same automobile down at the home of Fred Agnew at different times. Fred Agnew is a negro who lives out west of Fayette something like three miles."

Cross Examination.

By Mr. Tweedy:

Witness continued: "I think Fred Agnew was sent off to the insane ayslum once. As to whether he has been insane there for several years, nearly every time you would catch him selling whiskey, he would go crazy and get out. We caught him several times. He stayed in the insane asylum just a short time. They did take him down there. I never did carry him. I guess the Sheriff's force carried him; sometimes their own people get permission to carry them. The time I spoke of going down there with Dalton Barnes was before I became Deputy Sheriff. I became Deputy Sheriff when Mr. Jordan went in the Sheriff's office; and he went in in January, 1939. It was something like six months, I guess, when I went down there with Dalton Barnes. I was not going around buying whiskey for State fellows; I rode down there with him in his car. I don't remember what month it w[illegible]but it was in the summer sometime, and it was in the [illegible]ening. I did not drink any of the whiskey. He drank about half a pint of it going back. He offered me some, but I just didn't take it. I live up above Fayette about four miles. Kilby White is dead. When I went up there with him was before I became Deputy Sheriff. As to whether I have been Deputy Sheriff ever since Mr. Jordan was appointed Sheriff, he had been in something like, I guess, eight months before I went to work with him. I was

working for the State in Montgomery. I had not been working for the State so long, I don't remember how long. I was not working for the State when I got the eight pints; I was working for Jordan. He did not fire me over those search warrants up there. At the time Walter had the gun up there, we were making a search. As to whether we were supposed to be making a search under a search warrant, we had a search warrant. Walter and Dan didn't take any search warrants away from me. Deputy Key handed it to him to read. He grabbed it and put it in his pocket; and Mr. Key was trying to get it back; and that is when Walter come in the door with the gun. When I got back to the door, Dan and his wife both had hold of Mr. Key's arm. I didn't see them drop some more search warrants there. As to whether I saw those search warrants there in blank that didn't have anybody else's name except Judge Moore's name, I never did see it. As to whether the Sheriff was carrying blank search warrants and that was what they were scuffling over, no, sir, he just grabbed it and shoved it in his pocket. As to whether the Sheriff and I were sued for an illegal search, no, sir, I was sued for severely wounding his wife with a pistol. As to whether the Sheriff got sued over there for an illegal search, they sued him for beating his daughter. I never did read the suit against the Sheriff; he said it was for beating his daughter up; but his daughter was in school that day. He didn't tell me it was for an illegal search on the premises, I never seen the one Jordan had."

Whereupon, Counsel for Defendants, Mr. Tweedy, offered Case Number 3405-X in Jefferson County, Alabama, evidence.

(Defendants' Exhibit No. 1.)

(The Clerk will here insert said Exhibit.)

Witness continued: "I was not sued by Dan's young girl for running over her; I was sued for beating and severely wounding his wife with a pistol. Jordan was sued for wounding the girl in some way. I have nothing against Dan since he sued me. It didn't both me when he sued me. Right after suit was filed was when I stopped working for the Sheriff. I didn't stop work because he fired me because of the way I acted up there. Dan's wife didn't say anything to me, and Walter didn't say anything to me. Walter said to the Sheriff, 'I will kill the son-of-a-bitch.' There was a case made against Walter in Fayette County about that occurrence. I don't remember testifying down there that he said, 'I will shoot your damn brains out.' I just don't remember. As to whether I say that was August 28th, it is my best recollection it was, August 28, 1940. It has been so long, I just don't remember the exact day. My best recollection is I testified before in the trial of this case that it was August 28, 1940. As to whether I testified in the Circuit Court of Fayette County that happened in May, 1940, I just don't remember, it has been so far back. As to whether I testified it was in March, 1940, I don't remember. As to whether my recollection about the whole thing is hazy, it has been several years back and I didn't try to keep up with it. This eight pints I said I caught him with was not alcohol or cut alcohol. He pleaded guilty to it in County Court and paid it off. I don't remember whether he was convicted in Federal Court on that same eight pints. My best recollection is he paid off in County Court for the three pints. I don't remember whether he was convicted in Federal Court for the same three pints. That was Dan we had charges against for the eight pints and for the three pints. Walter had nothing to do with that that I know of. I didn't see Walter out there at that time, and didn't arrest him. I claim that we found two and a half gallons in one place and a gallon in another place at Wal-

ter's and he and Jim Fowler drove up in a car while we were there, and he had a quart and a half of bonded, tax-paid whiskey in the car. I don't remember whether we showed Walter other whiskey we had found, or not, he was so drunk. He was arrested and paid off the case. I don't remember whether he was charged with the wildcat whiskey or the bonded whiskey. We found that two gallons on that occasion about 150 yards east of his house up a little hollow that lead from Walter's back door. I didn't see Dan on that occasion, and didn't arrest him. As to whether it was beyond this wire fence and off his premises, it was right up beside the wire fence, close to it, I kind of believe it was on the outside of the wire fence."

Re-Direct Examination.

By Mr. Smith:

Witness continued: "I left the Sheriff's force because after this suit came up, he wanted me to help pay the lawyers fees; and I told him I would not. I said, 'You are the Sheriff, and you are drawing the fees and the money, and I am getting a monthly salary; and I will quit before I pay any of the lawyer's fees.' So he said, 'Well, I will get somebody that will.' I said, 'Be getting them.' I quit then. That is just what caused me to leave there."

Re-Cross Examination.

By Mr. Tweedy:

Witness continued: "I didn't testify before that he fired me; he just said, 'I will be getting somebody.'"

Thereupon, the following proceedings took place:

(By Mr. Tweedy):

Q. "Look at this testimony right here. (Showing witness a pamphlet.) You testified here before."

Mr. Smith:

"There is no evidence here that is his testimony. That is not the official record."

Mr. Tweedy:

"To refresh his recollection."

Mr. Smith:

"A bill of exceptions is not in question and answer form."

(By Mr. Tweedy):

Q. "I will ask you if you didn't testify before, 'He fired me because we had a few words six months later?'"

To which question the witness answered:

A. "No, I don't remember that."

Witness continued: "He discharged me because I wouldn't do that. As to whether he fired me, well, anyway, he quit giving me money."

Thereupon, Counsel for Defendants, Mr. Tweedy, made the following statement: "I want to introduce here the answer of Mr. Grady Mitchell to the effect they found that whiskey out in the potato patch. (On page 27 of Transcript of Record, in case of W. Daniel Pinkerton and Walter G. Pinkerton vs. United States of America, No. 11,006, appears the following: "A. 'Out northeast of the house about 100 yards there is a potato patch where we found a 10-gallon keg of whiskey.'")

W. J. BLANKENSHIP, a witness for the Government, after being first duly sworn, testified as follows:

69 Direct Examination.

By Mr. Smith:

"My name is W. J. Blankenship. I am now a Field Agent for the State of Alabama Alcoholic Beverage Con-

trol Board, and was such officer during May, 1940. At that time I worked part of my time in Fayette County, Alabama. I recall an occasion on or about May 29, 1940, in company with Sheriff W. P. Jordan, and Deputy Sims and J. E. Pearce going to the premises of Walter Pinkerton down about three miles of Fayette, Alabama; we found about three gallons of unstamped whiskey, located around on the premises and around the house, and we got about a quart and half a quart of whiskey out of the car that Mr. Pinkerton rode up in.. There was a little trail leading from his house up to where this can was hid, which was a hundred or a hundred and fifty yards from his house. It was a well beaten trail. There was one jacket can with about two and a half gallons in it, then there was a jug and I think two pint bottles and maybe a piece of a pint; I figured it be just about three gallons in all. This other whiskey, this jug, I think, was around there close to his house, to the best of my remembrance. I am not positive but I think the jug was full or about full. It was untax-paid whiskey. We found the jug of whiskey in the ground covered up. While we were there making the search Walter Pinkerton came up in a taxicab, and he had about a quart and a half of tax-paid whiskey. We found some more containers, two 5-gallon jugs and two 5-gallon jacket cans that smelled like whiskey. They were around the yard and around the house. All four of us officers were around there searching. I don't remember how many containers with whiskey in them we found in holes dug in the ground, the one with the jacket can was in a hole and a jug; I don't remember about the others, I believe they were just sitting around on the ground. I don't remember whether those that were covered were covered with leaves, they were covered with something. That was the only raid I was on."

Cross Examination.

By Mr. Tweedy:

Witness continued: "I have never testified in this case before. Walter was the one who was arrested there. We were making a search when Walter drove up. We went in and made a search around there before he was arrested. He started to run in the house and Mr. Pearce told him to wait awhile. That was when we got the whiskey out of the car he jumped out of. As to whether this five-gallon can was found down about 250 or 300 yards from his house, I don't think it was that far. As to whether it was outside the pasture fence, I don't remember whether there was any fence there or not. Mr. Key found it, the best I remember; I was right close to it when he found it. I don't remember that that was outside the fence. As to whether it was off his land, I don't remember that. I didn't see Dan Pinkerton there at all. I don't know whether you can see Dan's house from where we were or not. Mr. Walter Sims was along with us. I don't remember which one found that whiskey. I saw one of them pick it up, but wouldn't say for sure which one. As to whether Mr. Sims was up there where they found it, Mr. Sims was there, yes, sir. As to whether it was on the inside or outside of the fence, I don't remember seeing a fence there. The trail led from Walter's house up there. As to whether it went on over to a spring over there, I didn't go any further. I don't know whether there is a spring over there or not. It was found right close to the trail there, the trail went up to it. I don't remember whether the trail went right up to the whiskey or led beyond it, because it has been five years. I was there when they found it."

BELTON RICHARD KIRKLEY, a witness for the Government, having been first duly sworn, testified as follows:

71 Direct Examination.

By Mr. Smith:

"My name is Belton Richard Kirkley. I live at Fayette. I have known Walter Pinkerton and Daniel Pinkerton twelve or fifteen years. About June 26, 1943, a man named Gillam and his son, a soldier, got in my car with me and we went to Walter Pinkerton's house. When we got there Gillam and his son got out and went up to the house. There was another fellow, Leander Guin, with us. We got out and sit down on the well curb, and stayed around I imagine five minutes. I saw Walter Pinkerton out at the back of his house with Gillam and his son. I did not see the soldier hand anything to Pinkerton or see the soldier get anything from him. The soldier did not have a paper sack in his hand when he left the car. I didn't see him with anything when he left the car. I didn't see him with any whiskey on him when he went up to the house."

Thereupon, Counsel for the Government propounded to the witness the following question:

Q. "The first time you saw any whiskey there was after he got back, was it?"

Whereupon, Counsel for Defendants, Mr. Tweedy, interposed an objection to the question on the grounds it was not shown he did not have it in his pocket before he went up there and it was not shown where he got it; the Court overruled said objection; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

To which question witness answered:

A. "I didn't know whether he had it or not."

Thereupon, Counsel for the Government propounded to the witness the following question:

Q. "When he got back and you started back to Fayette with him, the whiskey appeared on the scene in his possession, is that right?"

Whereupon, Counsel for Defendants, Mr. Tweedy, interposed an objection to the question, on the ground it was not shown he did not have the whiskey before he went up there and not shown where he got the whiskey; the Court overruled said objection; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

To which question witness answered:

A. "Yes, sir. He had some whiskey on him after we started back to Fayette."

Whereupon, Counsel for Defendants moved to exclude said answer, upon the same grounds assigned to objection to the question; the Court overruled said motion; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

Witness continued: "After we were on the road enroute back to Fayette, Sheriff Lawrence stopped us; and the soldier boy had the whiskey and threw it out; and the soldier boy said it was his whiskey. I do not know what kind of whiskey it was. That was the first trip I made to Walter Pinkerton's. Sheriff Lawrence had a Deputy with him and two other fellows, whose names I do not know but whose faces I know. I did not see any other cars around Walter Pinkerton's house on that occasion. I did not go up to Dan's and do not know whether there were any cars there or not."

Cross Examination.

By Mr. Tweedy:

Witness continued: "I did not search the soldier or any of the rest of them before they went up there. Joe Cliff Gillam and his son and Leander Guin were with me. I don't know whether Joe Cliff Gilliam or any of the rest had any whiskey on them before we went to Walter Pinkerton's. We had driven back down the road about half a mile before I saw any whiskey; and I don't know where the whiskey came from. The soldier boy had the whiskey when I first saw it, he taken it out of his clothes somewhere, I don't know where he had it. I didn't know he had any whiskey before we went up there."

Thereupon, Counsel for Defendants, Mr. Tweedy, moved to exclude this testimony in regard to this whiskey, upon the ground it was not shown he did not have it before he went up there and it was not shown where he got the whiskey; the Court overruled said motion; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

Witness continued: "I don't remember, but I believe this soldier boy was sitting in the front seat with me and the others in the back seat. I do not know whether that was a pint of whiskey or not."

Re-Direct Examination.

By Mr. Smith:

Witness continued: "I have never had any dealings with the Pinkertons, I just know them. I did not see Gillam or his son or the other man drink any whiskey on the way down there. They drank one little drink, I imagine a swallow or two, on the back back."

Re-Cross Examination.

By Mr. Tweedy:

Witness continued: "I don't know where they got the whiskey. I didn't see Walter hand him anything, and don't know that he got it at Walter's."

H. E. FULLER, a witness for the Government, after being first duly sworn, testified as follows:

73 Direct Examination.

By Mr. Smith:

"My name is H. E. Fuller. I was formerly an A. B. C. State agent. I now live at Emelle in Sumter County, and am farming. I know Dan Pinkerton. I was an A. B. C. agent about May 24, 1941. About 5:20 P. M. on that date I went to Dan Pinkerton's house with B. T. Beaverton. We drove out up there, and there was severa cars there and Mr. Pinkerton delivered a container that I thought was whiskey to one of them; and he asked me what I wanted; and I asked him if he had any alcohol. He said he did. He asked me how much I wanted and if I wanted it straight or cut. I told him I would take straight alcohol. I bought a pint from him and paid him $2.00 for it. He went in his house and got the alcohol. I went back out there afterwards, but he learned who I was and I couldn't buy any."

Cross Examination.

By Mr. Tweedy:

Witness continued: "That was a dry county. I don't think I swore out a warrant for him that same day. My best recollection is it was Saturday afternoon and the

Courts were closed. I swore out a warrant a day or two after that. I went over there to Court; I don't remember whether it was that case or not, but I went over there on a case. As to whether that case came up for trial and I didn't appear in Court against him and they threw the case out, I was over there on one occasion. That was the only time I bought anything from him. I don't know whether they threw the case out. That was Century brand alcohol. It had a government stamp on it, which showed the government tax had been paid on it. I don't know whether the government tax on alcohol is twice what it is on whiskey. That looks like the bottle I got. I put a label on it when I got back to the room, that night."

Thereupon, Counsel for Defendants, Mr. Tweedy, offered the bottle of alcohol in evidence.

(Defendants' Exhibit No. 2.)

Witness continued: "I didn't see Walter Pinkerton around there. Dan was the only one of these two defendants I saw."

Re-Direct Examination.

By Mr. Smith:

Witness continued: "I was off a little distance and I couldn't tell what the package was I saw Dan deliver to the other men or customers there; I just saw him with a pint bottle. I don't know whether it was just like this bottle or not."

Re-Cross Examination.

By Mr. Tweedy:

Witness continued: "I don't remember whether I testified before about seeing a package delivered. As to

whether I know I didn't testify that before, I don't know that."

Rebuttal Examination.

By Mr. Smith:

Witness continued: "I don't remember whether the prosecuting attorney asked me about that before."

A. B. CORBIN, a witness for Government, being first duly sworn, testified, as follows:

74 Direct Examination.

By Mr. Smith:

"My name is A. B. Corbin. On or about October 11, 1941, I accompanied Sheriff W. P. Jordan and S. F. Meadows down to Walter Pinkerton's house. I personally didn't find anything. I was in the room with Walter. Two one-gallon jugs of liquor were found somewhere else; I don't know where they found it. When I saw the liquor, Mr. Jordan and Mr. Meadows had it. It was white liquor, sometimes commonly known as moonshine."

Cross Examination.

By Mr. Tweedy:

Witness continued: "Just about the time we drove up, Walter and his wife drove up, too, all about the same time. I don't know that they had been away over night; they came in with some other stuff in their car. No whiskey was found in the room where I was. Mr. Jordan, Mr. Meadows and Mr. Key did the searching. That was Luther H. Key and Sam or S. F. Meadows. I don't know how many bedrooms there were in that house. We

went through the kitchen and into the room where I was at with Walter; that was only room I was in. I took it to be a sleeping room. They said something about finding the whiskey back there, but I don't know where they found it. I was sitting up there by the fireplace with Walter during the search."

J. E. PEARCE, a witness for the Government, being first duly sworn, testified as follows:

75 Direct Examination.

By Mr. Smith:

"My name is J. E. Pearce. About May, 1940, I went with Mr. Blankenship, of the A. B. C. Board, Mr. Couch, Mr. Key and Mr. Sims, Deputy Sheriffs, down to the Pinkerton farm in Fayette County to search for liquor. We found about a quart and a half of stamped whiskey and about two or two and a half gallons of wildcat whiskey in cans and one jug and possible two and a half pints in bottles, pint bottles. The cans and bottles were around the place, around the edge of the woods. I didn't find it myself; I don't know just where they picked it up. I was on the other side of the house when they found it; but I saw it when it was brought in the yard. That was the only time I ever searched there."

Cross Examination.

By Mr. Tweedy:

Witness continued: "I don't know how far out in the woods or where it was found or whose property it was on. Dan wasn't there at that time. I don't recall whether Dan's house was in sight. Mr. Blankenship was in charge. I don't know what they charged Walter with. Mr. Pink-

erton and some other man drove up there after we were already there."

Witness continued (in answer to a question propounded by the Court): "If I remember correctly in this can was around two gallons of non-tax-paid whiskey, with one jug of non-tax-paid whiskey and two pints and a half of non-tax-paid whiskey in bottles."

Witness continued: "I didn't see it picked up."

HENRY L. DARNELL, a witness for the Government, after being first duly sworn, testified as follows:

76 Direct Examination.

By Mr. Smith.

"My name is Henry L. Darnell. Back in 1942 and 1943 I was an investigator in the Alcohol Tax Unit working in the North Alabama District. Along in September of 1942 I was engaged in making investigations in Fayette County, Alabama. I became acquainted with the farm owned by Daniel Pinkerton and known as the Pinkerton farm. In my judgment their homes are about two or two and a half miles from Fayette. The homes on the farm I would say are between 125 and 150 yards apart, each on the same side on the road. They are on the righthand side of the road after you turn off the Fayette Highway. At that time there were two well traveled paths connecting the houses, one was just to the edge of the road and the other connected the back of the houses."

(At the request of Mr. Smith, the witness drew a diagram on the blackboard with a piece of chalk, which diagram is copied, as follows:)

I
V
W
D
H
76
I
Swamp

Witness continued: "This is a little out of proportion. This represents the road from Fayette, this is the other road. This is Dan's home, and this is Walter's home. This path here was just off the road; this is from Walter's house itno the driveway at Dan's, this driveway into his garage. His garage is attached to the house somewhat in that position, a double garage. It had an attic and four little cupola affairs built in. Walter didn't have a barn. There was a shed there in about this position that had been dug out in the bank; it could have been used as a storage bin. Each of the houses faced the road in this direction. I have made several investigations around there for liquor. We searched this area (indicating) and at various times we found containers that had been used for non-tax paid whiskey, that is, the odor was there and perhaps a few drops in the containers, indicating the use to which they had been put."

Thereupon, Counsel for Defendants, Mr. Tweedy, moved to exclude the statement in regard to the containers, their odor, and use on the grounds the witness was not qualified and it invaded the province of the jury.

Whereupon, Counsel for the Government propounded the following questions to the witness:

(Mr. Smith):

Q. "How long have you been raiding moonshine stills and making investigations about moonshine whiskey?"

(Witness):

A. "About three years."

Q. "There is a difference in the smell of moonshine liquor and tax-paid liquor, isn't there?"

A. "Quite a bit."

Q. "You don't ordinarily find tax-paid liquor in gallon jugs and tin cans and glass jars, do you?"
A. "No, sir."

Whereupon, the Court overruled the motion to exclude the statement made by the witness in regard to the containers, their odor and use, as just above set out, which motion was made by Counsel for Defendants; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

Witness continued: "There is a field betweeen Walter's house and a house somewhere in this area (indicating), but I searched for a quarter of a mile back in there; there is a hill out there, making a kind of bowl-shaped affair; then you get in the flat. That is out by the pasture; but over in front of Walter's house, there is a little field that widens out as you go down. This area over here is swamp (indicating). I have found liquor over here on more than one occasion. I have found liquor and containers back of Walter's place I would say half a dozen or more times. There was one particular container we left there about three weeks; it was well concealed. It was a 5-gallon stone jug. That was on this hill side nearer Dan's house than Walter's; and it was concealed in a stump. It had traces in it and had been used for moonshine whiskey. We left that; and I think we searched the place two or three times; and finally when we brought it to town, we brought it by Dan's house. He was up town. Dan asked where we found it and wanted to know if there was any whiskey in it; and I told him there wasn't at that time, but had been. We went out one Sunday morning just after a rain; and this little field here (indicating) I think at that time was possibly planted in cotton; but there was a garden spot here (indicating); and we found a pint of whiskey in the garden in the weeds. That was Walter's

garden, that is, it was closer to his house. On that Sunday morning I saw a set of tracks from the front door, across the road, across this and to the swamp; and found a gallon of untax-paid whiskey that had been placed against a stump and covered with leaves. The same set of tracks led back. The whiskey was in a glass jug with a stopper. Only one set of tracks led to it and from it. I don't recall the exact date, but around Christmas, sometime about December 19, 1942, we got a call from the Sheriff's office at Fayette that a car had burned. I went out to the place. The automobile was in the ditch on the side of the road, and at that time the car was still there and in the burned condition; but underneath the glass and charred upholstery and things, I dug in to the floor board of the car and found nineteen metal caps, that is, of the type which are commonly used on gallon jugs. Then there was quite a bit of cardboard in the car that had not burned and which was still moist and it smelled of whiskey, moonshine whiskey. There was quite a bit of glass in the car, some broken and some so hot it was melted and run together. It appeared to be glass jugs, because some of them, the top was still intact, and they were tops of jugs. At that time Walter had a 1936 Ford. The car that burned was a 1939 Chevrolet. I had seen that 1936 Ford car at Dan Pinkerton's yard. When I was first assigned to the territory, the car had been wrecked, and at that time it was in Dan's yard, and stayed there I would say four to six weeks; it was repaired from time to time and finally placed in running condition. I have never seen Walter Pinkerton going anywhere with Eulus Porter or Cornelius Porter. I took a statement from Fred Agnew in which he implicated Walter, but I didn't see Walter with him. Fred lived in the opposite direction from Fayette, about out in this direction (indicating). That would have been about ninety degrees apart, clockwise. There was a Packard automobile there on the premises of Dan

Pinkerton. At that time tire rationing had just gone into effect, and the tires had been removed from the Packard automobile and it was stored at the garage. That Packard stayed there the whole time I was in that territory. I was with Sheriff Lawrence on the occasion when we stopped the Kirkley car. We saw the car come out from this side road from his house. We stopped the car, and they dropped a bottle out of the car; and if I remember correctly we recovered a full pint bottle of non-tax-paid whiskey. I wouldn't say positively what kind of a bottle it was in, but it has no seal on it indicating it was tax paid. I know it was non-tax-paid, and it was a pint. In the fall and winter of 1942 Walter Pinkerton was driving the same 1936 Ford I first saw in a wrecked condition in Dan's yard. Later on in 1943 he was driving the same automobile. I don't recall ever seeing him riding in a Plymouth. The burned car was a Chevrolet, it belonged to Eulus Porter."

Cross Examination.

By Mr. Tweedy:

Witness continued: "In the automobile that burned was quite a bit of glass. It burned so hot some of the glass was molten. The car was not burned pretty well all over, it was burned from the cowl back. The cowl is where the hood ends, right in front of the dashboard. The motor wasn't burned at all. The hottest part of the fire was in the back part of it. The hottest part of the fire was where I saw the molten glass. I didn't see Eulus Porter there at the time. I saw Walter's and Dan's mother most of the time at Walter's house. I would say the fire burned the glass in the door. I would say the houses were in sight of each other. From the houses I wouldn't say positively. I have never been in the house and looked toward the other; but I am sure they were toward the road; I

would say on the trail close to the edge of the road, you could sight that at the driveway where it intersects at Walter's and see Dan's house. I have seen trails leading from one neighbor's house to another. The two sons lived close together and their mother lived at one of the houses. There was several outhouses behind Dan's house. There wasn't a barn half way or close to half way between the two houses. I couldn't say whether they used the same barn on the farm. As to whether the back trail led from Walter's house up to the barn and from Dan's house to a shed, I can designate how it ran; it led a little up beyond; it terminated here at Walter's yard. It didn't lead right back of Dan's house, but on the premises, I would say possibly 30 yards. That is one of the paths I was talking about and the other path is in front of the house. As to whether the path back of Walter's house led up to the corn crib, where I saw some corn and saw some other things, it was not to the corn crib, it was in front of the corn crib. There were some cows in a pasture over behind the hill; who they belonged to, I couldn't say. There was a lot behind there I saw a mouse colored horse in a time or two, behind the corn crib. In my searches around there I never found anything around Dan's house except Federal tax-paid whiskey; I never found any moonshine or bootleg liquor at his place. This gallon I found out across from Walter's house was across the road in the edge of the swamp, I would say four or five steps from the cotton patch; I didn't go down into the swamp. The swamp was full of trails; they went in every direction. That whiskey was I would say six or eight feet off to the right of the trail the way I was headed. The Packard car was sitting up there when I saw it with the tires off and was behind the corn crib. It was not in use then. The 1936 Ford was repaired up at Dan's; it was in front of the corn crib and to the left of it. I wouldn't say for sure we got a full pint from that Kirkley car. I didn't

testify while ago it was full; he asked me if it was full, and I told him I didn't recall. I didn't testify while ago it was full. The soldier threw or dropped it out of the car. He was sitting on the front seat. I would say we found it in four or five feet of the car. I do not know that that was 75 yards or 75 feet away from the car. We were headed toward the Pinkerton house when I saw them. We turned around to go after them. They were headed toward Fayette, and we stopped them about a quarter of a mile from the Pinkerton house, in sight of the road that turns off to the Pinkerton house. We searched them there."

Re-Direct Examination.

By Mr: Smith:

Witness continued: "Sometime a little after February 5, 1943, I saw a 1936 Ford automobile down at the jail in Fayette. It was Dan Pinkerton's car. That is the car that was said to have been operated by Cornelius Porter and Walter Pinkerton."

Thereupon, Counsel for the Government propounded the following question to the witness:

Q. "Prior to becoming connected with the Alcohol Tax Unit of the United States Government, what business were you in and over what period of time?"

Whereupon, Counsel for Defendants, Mr. Tweedy, interposed an objection to said question, upon the ground it was incompetent, irrelevant and immaterial; the Court overruled said objection; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

To which question the witness answered:

A. "I was with the City of Birmingham ten years, four of which were spent as a detective."

Witness continued: "After that I took a position with the Alcohol Tax Unit. I am now in the United States Navy."

Witness continued: (In answer to a question propounded to the witness by the Court) "My investigations around the Pinkerton property covered the period from about the 1st of September, 1942, until March, 1943."

Re-Cross Examination.

By Mr. Tweedy:

Witness continued: "I couldn't say whose that 1936 Ford was. As to what I said it was Dan's car for, it was in Dan's yard every time I saw it, it was repaired in his yard when it was wrecked. I saw it frequently while it was being repaired. I never saw Dan driving it. I couldn't say whose car it was. I didn't check the license for ownership; I checked it for identification purposes. I didn't go down there and check and find out it was Walter's car. It was repaired out in the open, not under a shed. I never did see anybody working on it. I do not know whether Walter repaired it or Dan repaired it or who repaired it."

Rebuttal Examination.

By Mr. Smith:

Witness continued: "I saw Walter driving that 1936 Ford which was in Dan's yard after it was wrecked and repaired; and that is the same car I saw down at the jail. The first time I saw it in use was after Eulus Porter was burned, that is, I stopped Walter and his wife, with Wal-

ter driving, going into Fayette in the Ford; and that was the first time I ever saw it on the public highway. It was not this Ford which was burned, it was a Chevrolet; and the first time I saw the Ford in operation was after the Chevrolet had burned."

Surrebuttal Examination.

By Mr. Tweedy:

Witness continued: "I never saw Dan driving that Ford. I don't recall whether that Ford I am speaking of had the right front window broken out of the door. I don't recall whether the one I saw down at the jail had pasteboard in the right front window; but I do know the license and sticker it had on it. I could identify it that way. I could that particular 1936 Ford by looking at it; but I don't recall about the things you just mentioned."

CORNELIUS PORTER, a witness for the Government, after being first duly sworn, testified as follows:

83 Direct Examination.

By Mr. Smith:

"My name is Cornelius Porter. Eulus Porter is my brother. I have known Walter Pinkerton all my life. I know Dan Pinkerton. I recall an occasion on or about February 5, 1943, when Walter Pinkerton and I went to Pickens County. We went from Fayette in Walter Pinkerton's car. I don't know what part of Pickens County we went to; but while in Pickens County we got some whiskey. Walter claimed it was 19 gallons. He said something about seven or eight dollars, but I don't know how much he give for it. We were in a Ford car, I think a 1936 model. On the way back to Fayette the law was in

the road; and he backed up and went another road. Walter was driving. The officers we saw was Luther Key and Travis Lawrence. After we got out the other road we had a blow out and we left the car. We went off in the woods; and then we started back in to Fayette. The whiskey in the car was not my whiskey. We stayed in the woods an hour or so. The best I remember we left Fayette that day about noon, and got back about 8 o'clock that night. That was the only trip I made with Walter. I remember when the Pinkertons' case was last tried up here in Federal Court sometime last spring. I was charged with conspiracy in that indictment with them; and entered a plea of guilty and got probation. My brother Eulus had a Chevrolet car; I have forgotten the model. That car burned. It burned before I went down in Pickens County with Walter. It burned just before Christmas the year before, about December 19th. I know where William Claude Smith lives. The night that car burned I was at home. I was about half a mile from where Eulus got burned in the car. Walter Pinkerton was with Eulus on that occasion. They sent for me to come down there, a fellow came after me. Walter didn't come after me. I went down where the car burned. I didn't go up to the car. The car was burning, and my brother was burned; and Homer Harkins went and got a car and gave it to me; and I went to the hospital. I don't know where Walter was; I was out there in the road with my brother, the best I remember. I took my brother to the hospital. That car burned up pretty well."

Cross Examination.

By Mr. Tweedy:

"I never had any agreement with Dan Pinkerton to violate the Internal Revenue laws; and never had any agreement with Walter Pinkerton to violate the Internal Reve-

nue laws. I never had any agreement with Fred Agnew to violate the Internal Revenue laws. I never had any agreement with Eulus Porter to violate the Internal Revenue laws. I have never been in the whiskey business with any of those parties. As to why I pleaded guilty to conspiracy if I had no agreement with them, I was caught with him; I was guilty with him. I testified I didn't have any agreement or understanding to violate the law. I did not plead guilty to get probation; I pleaded guilty to pay off. I pleaded guilty in State Court to pay off. I did not plead guilty up here to get probation. I did not also have an agreement with the officers down in Fayette County to implicate Walter Pinkerton. They tried Walter on that charge down there. I testified in that case. I pleaded guilty down there to an attempt to transport whiskey. I reckon I pleaded guilty up here to violating the prohibition law. As to not pleading guilty up here to conspiracy, I don't know what; of course, I know, anyway, I pleaded guilty to being in the automobile with the whiskey in it. I was not driving that car. I think that car had the right front window broken out, or rather I think it had some glass broken out. I don't remember whether it had pasteboard up there to keep the wind out. That was in February —I think it was in January, I can't tell you what part of January. That was the same car they took and sold down there at the jail later on, in Fayette County. I have not and am not still driving Walter's car. I had never driven this car before a single time. I think we left Fayette on that occasion about noon. When we got down there I knew something was being put in the car; I didn't drink any of it; he said it was whiskey. I never pleaded guilty to something I didn't know what it was; I suppose I knew it was whiskey. I found out it was whiskey; I took a drink or so as we come along. I didn't buy the whiskey down there; didn't taste it down there; and didn't drink any down there. The officers did not tell me if I said it was

Walter Pinkerton they would let me off light. They did not let me off for $100.00 for 19 gallons of whiskey; I paid about $140.00, that is, including costs. They did not also tell me up here if I would come up and testify against Walter up here, they would let me off on probation; they didn't promise me anything. I couldn't swear I would get probation; I didn't have that agreement; they didn't promise me nothing. They did not promise me down in Fayette County they would let me off with a fine. I was arrested about fifteen years ago for whiskey, for violating the prohibition law, I never been caught for transporting. I was caught with a small amount, a pint or something like that; that wouldn't be transporting it. I had not been with Eulus Porter in that car that night before it burned, or the evening before. I hadn't driven around with Eulus any. It was about midnight when I went up about where the car burned. It was a big fire; I imagine it was a hot fire, I didn't go around it. I did not get in a hundred feet of it. I could see it and it was a big fire."

Re-Direct Examination.

By Mr. Smith:

Witness continued: "I know J. Walter Sims, who used to be a law enforcement officer. After this trip to Pickens County with Walter Pinkerton to get this liquor I did not have a conversation with Mr. Pinkerton as to what I should do in connection with any complaint made about that whiskey. I recall when some Federal men talked to me about the trip I made with Walter. I don't remember telling Walter about the Federal men coming to me; I don't think we talked about the case, the best I remember. I don't think Walter asked me about it after I talked to the Federal men. About fifteen years ago, maybe longer, about 1925 or 1926, I haven't checked it, I was caught with a pint of whiskey. I haven't violated the prohibition

laws since 1926. I was never out with Walter Pinkerton except when I was with him on this occasion; and I never did use his car. On this particular occasion I don't think Walter made complaint that somebody stole his car. I sure didn't steal it."

WILLIAM CLAUDE SMITH, a witness for the Government, after being first duly sworn, testified as follows:

86 Direct Examination.

By Mr. Smith:

"My name is William Claude Smith. I live at Fayette. I know Walter Pinkerton. I have known him a year or two. I remember about December 19, 1942, when a Chevrolet car burned up down the road close to my house. I saw Walter Pinkerton that night, he stayed all night at my house. He come from back down toward the car to my house. They said Eulus Porter got burned. I never saw Eulus. I did not see Cornelius Porter there that night. Walter Pinkerton came to my house and said he aimed to go home when Cornelius took his brother to the hospital; and he sit around there a good while; and he said he wanted to stay all night with me. I let him stay all night. He said Eulus got burned pretty bad. Walter didn't say whether he had been out with Eulus or not. Walter left pretty early the next morning. He told me to wake him up pretty early. I don't think he had been drinking that night; I didn't smell it. After Walter left my house, I got up the hill where the car was. They said it was a Chevrolet."

Thereupon, Counsel for the Government propounded the following question to the witness:

Q. "Did you smell anything when you got there?"

Whereupon, Counsel for Defendants, Mr. Tweedy, interposed an objection to the question propounded to the witness, on the ground the car was not in the same condition it was the night before; the Court overruled said objection; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

To which question the witness answered:

A. "I smelled whiskey around the car."

Whereupon, Counsel for Defendants moved that said answer be excluded, on the ground the car was not in the same condition as it was the night before; the Court overruled said motion; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

Witness continued: "On the inside of the frame work of the car I saw melted fruit jars, or something like that. There were several. It looked like it burned pretty bad; it looked like it burned up the fruit jars or glass jugs or something like that. They were in the back part of the car, the best I remember. I smelled liquor around the car. I think I can tell whiskey when I smell it. The car stayed there several days; they come from Fayette and got it—Cornelius Porter."

Cross Examination.

By Judge Curtis:

Witness continued: "They said the car belong to Eulus Porter. I didn't see Eulus that night. That road is known

as Ridge Road. I live just down the hill from where the car was, it wasn't very far from my house. Going the way the car was headed I couldn't tell you how far it would be to Walter Pinkerton's house; it was headed toward Fayette. Back over there a piece further you could turn and go to Walter Pinkerton's house; I don't know nothing about them roads. You turn off at Cornelius's to go to Eulus's house. Walter came down to my house and stayed all night. I never did see Cornelius Porter. Cornelius lived about a quarter from me. I had never seen Walter Pinkerton and Cornelius Porter down in that neighborhood together before. I had never seen Eulus Porter and Walter Pinkerton together down there before. I live right close to that road. I don't remember seeing Walter Pinkerton or Dan Pinkerton with either of the Porters before that time. From where the car was to Fayette was a little better than five miles. Walter told me when he came there that Eulus was driving the car and went into the ditch and they sat in the car two or three hours trying to get it out and it burned up. This glass was between the back seat and the front seat on the floor of the car. It was fruit jars or bottles or something like that. Some of them were so burned they melted and run together. Some of the glass was out of the doors of the car and some of them wasn't. I don't know whether the glass that came out of the car doors was down between the seats or not. I knew there was a fire there before Walter Pinkerton came to the house. I saw the car go up there and stop there a good while; I didn't go up there. The car had been there a right smart little bit before I saw the fire. I was farming at that time. I passed the road the next morning early where the car was parked going to my work. I just looked over in the car. At that time I hadn't noticed anybody there."

Re-Direct Examination.

By Mr. Smith:

Witness continued: "This car that burned up was headed toward Fayette. Eulus had passed the place to turn out to his house at least a quarter on the way to Fayette. Walter Pinkerton could have turned off that road and gone to his house, but it was headed on the Ridge Road going to Fayette; of course, he could have turned off and gone home. He would have had to turn off the Fayette highway going to Vernon to go to his house anyway."

H. W. LIDDON, a witness for the Government, after being first duly sworn, testified as follows:

88 Direct Examination.

By Mr. Smith:

"My name is W. H. Liddon. I was formerly employed by the Alabama Alcoholic Beverage Control Board and was so employed in 1941. I now live in Memphis, Tennessee. I am now selling batteries for the Southern Battery Company. In the spring of 1941 I was engaged in undercover work in connection with liquor in Fayette County, Alabama, and other counties. Sometime about April 15, 1941, I went to the premises occupied by the Pinkertons. I drove up from Fayette out there and the first house I came to was Walter Pinkerton's house. I stopped there and was informed he wasn't home; so I continued on down to Dan Pinkerton's. I met a man and bought a pint of whiskey from him. I told the man I stopped at Walter's place up there and he wasn't at home. He told me he was Walter. Walter at that time was in the back yard. I told him I heard of his peach alcohol and I would like very much to have some. He

told me he didn't have any. Then we discussed a little further, and I insisted; and he finally went in the house and brought me back I think a half a pint in a bottle of what he called peach alcohol. He brought the whiskey from the garage first and went into the house for the alcohol peach, about half a pint of alcohol. The whiskey was government stamped whiskey, I don't remember the brand. I paid $2.00 for it, I believe it was. I believe I paid $1.00 for the peach alcohol, I am not sure, but believe it was a dollar. The peach alcohol was reddish brown in color, I believe, pretty much the color of bonded whiskey, kind of reddish brown. Walter told me on that occasion it was his own mixture, he had a good sale on it, and he put it up himself. This defendant on the end is the one who was talking to me. (Indicating.) I went back down there later, and saw this one on this end, Dan, I believe he is called. I didn't see Walter on that occasion. That was at the same house where I saw Walter previously. I talked to Daniel on that occasion, and he told me he didn't have any whiskey. I do not know whether they found out who I was in the meantime."

Cross Examination.

By Mr. Tweedy:

Witness continued: "I never saw Dan until I went the second time. I don't know whether he had any way of knowing who I was at that time, none that I know of. I did not see Dan when I went there the first time. It is not a fact that I bought only one pint of whiskey there. One pint I bought was government stamped whiskey. I think I left the whiskey I bought down in the Sheriff's office at Fayette, and think I left the other down there. There was another man with me. The last time I heard of him he was in Atlanta; he is not here today. I haven't got any evidence here today that I bought except my

own word. I didn't take a receipt. I did not make out a case that day; I guess it was two or three weeks before I swore out a warrant. I believe I had left the whiskey in the Sheriff's office before then. That case was tried in County Court. I was an officer of the law and had the authority to make an arrest. I didn't tell him he was under arrest for selling it to me then, although he had it right in my presence. I didn't analyze the other stuff. It smelled like it had alcohol in it, it smelled of alcohol pretty strong. I was around Fayette after I went up there and bought that whiskey that night and was back in Fayette a couple of days later, and I was back in Fayette County two or three weeks later. I never went to Court to testify in that case; they never summoned me."

Re-Direct Examination.

By Mr. Smith:

Witness continued: "Mr. Jordan was Sheriff then. I think I left the liquor and alcohol there with him. I think I marked it. I don't know what was done with the case, whether it was nol pressed, or whether he paid off, or what. I was doing undercover work at that time and trying to get as many purchases as possible off them before making an arrest. I never have taken receipts from bootleggers, and I have never heard of anybody doing that. I never heard of a bootlegger giving a total stranger a receipt when he sold them liquor. Fayette County at that time was supposed to be a prohibition county."

Re-Cross Examination.

By Mr. Tweedy:

Witness continued: "I haven't known of Dan Pinkerton selling anything but tax-paid liquor in Fayette County. I

have heard that didn't violate the Government laws even to sell that in dry counties."

W. P. JORDAN, a witness for the Government, after being first duly sworn, testified as follows:

90 Direct Examination.

By Mr. Smith:

"My name is W. P. Jordan. I was formerly Sheriff of Fayette County, Alabama, and succeeded H. G. Mitchell down there. My term started January 15, 1939, and ran up until January, 1943. Capt. Travis Lawrence took my place then; he is now overseas. While I was Sheriff of Fayette County I became familiar with the premises occupied by Daniel and Walter Pinkerton. The way I became acquainted with their premises and them was, if the Sheriff has a complaint, we go out and search them for liquor on search warrants. I couldn't tell you the number of times I went out there, I didn't keep any record. Luther Key was my Chief Deputy. Walter Sims worked with me as Deputy. I released Sims. He was just a little bit hard for me to control. He was a little fast with a gun. I told him he might cause me to be sued, and I didn't want to be sued. In regard to making an investigation on the Pinkerton premises about October 7, 1939, with Mr. Sims and Mr. Key, it was somewhere along there, I don't recall, it has been a good while ago, and we were out there so many times, I don't remember. Sometimes in making investigations, we would come in the back side and get out on the hill, and cars would drive up in front. We would watch the house, and we would go down and usually found whiskey as they come out to the whiskey to deliver it. At times we would get the whiskey when they would bring it to the car; and at times we would go out in the

woods and get whiskey. I have seen a man walk to the woods; and one time I was over there and Walter Sims caught him with two pints in his hand, and went back to the stump, in the direction he come, and got some bottles, I don't remember how many, out of the hole. On these occasions cars would be waiting; and he would go to the car—and there was a door that went out right as you went in into the garage, that was the only way to get in—and he would come back to the car. I have seen them give the man in the car something, but I never did see them take anything from him. That was wildcat whiskey in those bottles, that two pints and six pints, or eight pints. I think it was in refuse whiskey bottles. On this occasion when we got the two pints and the six pints, we made a case against him in Fayette County, and he pleaded guilty to it."

Thereupon, the Court propounded the following question to the witness:

Q. "Which one of the Pinkertons was that?"

To which question by the Court the witness answered:

A. "Mr. Daniel Pinkerton."

Witness continued: "About May 29, 1940, with Sims, Key, Blankenship and Pearce I made another raid out there, at Walter's house; and that is the time Jim Fowler and Walter come up in a car, and we got a quart and another quart about half full out of the car, the best I remember. Now, Mr. Walter claimed the liquor; and we made a case. As to containers, bottles and jugs and kegs found around the premises, he found two 5-gallon jugs up in a hole on the hill; I didn't see him find it. As to what

my best recollection is as to how much was found around the premises on that occasion, you know I had no way to measure it. Some of the cans were about half full, I think two of them—about five gallons of wildcat liquor. The tin cans had no stamps on them to indicate the tax due the Government of the United States was paid. About August 28, 1940, I went down to Daniel Pinkerton's place to make an investigation and had some trouble with Walter about a rifle. Mrs. Sims and Mr. Key went ahead and I stayed outside that door I told you about. I heard them, and when I went to the door Daniel and his wife had ahold of Mr. Key. I said, 'What's the trouble?' About that time Walter put the gun in my face, a 22, and Daniel's wife slammed the door on him. And when she hollered something—I don't know what she hollered—I stepped outside and reached for my gun; but I never did pull my gun out. I don't recall just what Walter called me; they hollered "lock out," you know. I didn't see any liquor on that occasion. I did not harm Daniel Pinkerton's wife or Walter Pinkerton's wife on that occasion. There were no girls belonging to either man there on that occasion. Neither I nor any of the other officers beat his wife up on that occasion. I was sued about that trouble; but he never collected any money out of me about it. An argument came up about a search warrant on that occasion. About December 7, 1940, Mr. Key, Mr. Sims and I went down to Dan's place and made a search in the garage, and found three pints he had covered up with some brick in his garage. I don't remember whether they were Government bottles or not, but they didn't have no seal on them. About May 26, 1941, I went down to Fred Agnew's."

Thereupon, Counsel for the Government propounded the following question to the witness:

Q. "Who is Fred Agnew?"

To which question witness answered:

A. "Mr. Key caught him twice. I don't remember the date, but I caught him one Sunday morning sitting on a stump pouring out a pint of wildcat."

Whereupon, Counsel for Defendants moved that said answer be excluded; the Court excluded said answer of the witness as not being responsive to the question.

Witness continued: "Fred Agnew is a darky who lives down below Fayette, sort of southeast. Mr. Pinkerton lives west or sort of southwest."

Thereupon, Counsel for the Government propounded to the witness the following question:

Q. "You said something about Fred pouring out a pint of moonshine whiskey, when was that?"

Whereupon, Counsel for Defendants, Mr. Tweedy, interposed an objection to the question, on the ground it was immaterial, irrelevant and incompetent; the Court overruled said objection; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

To which question the witness answered:

A. "I don't remember the date; it was on a Sunday morning."

Whereupon, Counsel for Defendants moved to exclude said answer of the witness, on the ground it was imma-

terial, irrelevant and incompetent; the Court overruled said motion; and Counsel for defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

Witness continued: "I never did see Fred Agnew with Cornelius Porter or Walter Pinkerton or Dan Pinkerton. I met Walter one Sunday in his car going down about Fred's and stopped him. Fred was not with him. Walter was just a little piece from his house. About May 31, 1941, I went down near Agnew's house with Mr. Key and let Mr. Key out. That was about a week later than the occasion I just mentioned. When I got over there Mr. Key had Fred with a pint of whiskey. I don't recall whether another negro, Arthur Redus, was with Fred. I went down to Walter Pinkerton's about October 11, 1941, with Mr. Key, Mr. Corbin, and Mr. Meadows and made a search there. I found two gallons of whiskey in a bedroom back of the kitchen. It was in two glass gallon jugs and was moonshine whiskey. I made a case in State Court against Walter on account of that whiskey. He pleaded guilty and paid it off."

Cross Examination.

By Mr. Tweedy:

Witness continued: "Dan paid off for the eight pints I spoke of down there in County Court. Dan was prosecuted here in Federal Court on that. I have no ill feeling toward either one of the Pinkertons. It didn't make me feel none too good when he sued me. But I had no ill feeling against him because of that suit. I was not sued three times for it. Dan sued me himself for illegal search. As to Dan's wife and daughter suing me, it was all the same time and same suit I suppose. There were three

different suits filed against me, but I wasn't convicted in either one. I let Sims go because he was too handy with a pistol. I was charged in a suit by Earline Pinkerton that Sims beat her with a pistol, but was never convicted. It was sometime after suit was filed that I released Sims, I released him the last of May; he had been there about fifteen months. I went in in January, 1939, and he stayed with me through May of the second year. I released him in May of 1940, I think I am right about that. I know he was working for me when the gunplay came up, regardless of when it was. As to whether the rifle matter happened in March, 1940, I don't know what what date it was; I ain't testifying to dates. We had a search warrant out there on that occasion. I don't know whether the papers you show me were the warrants we had out there. We showed them one like this. These ain't got no name. As to whether that is the kind of search warrants we had they are not. We had one filled out. Judge Moore filled it out. I didn't say we had those you show me. I didn't have the search warrants; Mr. Key had the search warrants. The search warrant was filled out; them are blank."

Whereupon, Counsel for Defendants, Mr. Tweedy, stated: "We introduce these warrants in evidence."

(Defendants' Exhibits Nos. 3, 4 and 5.)

(The Clerk will here insert said Exhibits.)

* * * * * * * * *

Witness continued: "I know the warrant was filled out; I seen the warrant that day. As to whether I testified a minute ago I didn't see it, I said I didn't see it after Daniel got hold of it. I had seen it beforehand. Daniel and

Mr. Key got into it about the search warrant. I saw it and it was filled out before Judge Moore. I testified in Federal Court against Dan on this three pints. The one and a half-quarts we got from Jim Fowler and Walter Pinkerton was tax-paid whiskey. I didn't see the other officers when they got the other whiskey on that occasion. I didn't see Dan there on that occasion. Walter had just driven up in a car. In regard to the two gallons we got in the bedroom at Walters, I don't know whether Walter and his wife had just driven up, but he was in the house. He was in the kitchen and we called him back there and showed it to him. Mr. Corbin was along. As to whether we drove up just about the time Walter Pinkerton drove up, I say we all went up about the same, and he come in the house. I don't know whether that was Walter's bedroom. Mr. Meadows was in there, I don't know whether Mr. Corbin was in there, but Mr. Corbin was along though. I found that whiskey."

Re-Direct Examination.

By Mr. Smith:

Witness continued: "I don't know where Dan Pinkerton or Walter Pinkerton got these so-called search warrants. He might have made them for all I know. Walter didn't take any blank search warrants from me on that occasion; if he took any, he got them out of the car. I didn't see him take any off of Deputies Sims or Key."

LUTHER KEY, a witness for the Government, after being first duly sworn, testified as follows:

95 Direct Examination.

By Mr. Smith:

"My name is Luther Key. I was formerly Deputy Sheriff of Fayette County, and served under Sheriff Jor-

dan. I am now Sheriff. During the four years prior to the time Travis Lawrence became Sheriff, I worked under Mr. Jordan. On the numerous trips I made down to the Pinkertons' premises Mr. Jordan and Mr. Walter Sims were with me. I remember an occasion, about January 14, 1940, being out at the Pinkertons and there were several cars drove up there. He went in and out of the house two or three times. One time we gave him time to get back, and got there about the time he did. He threw a pint bottle down and busted it; but that had a seal on it. I remember an occasion, I believe about October 7, 1939, we caught him with two pints in his hand and got six more in a stump hole he got the two out of. About May 29, 1940, I went out to Walter Pinkerton's with Mrs. Sims, Sheriff Jordan, and State Officer W. J. Blankenship, and J. E. Pearce. We were out there and Walter and another fellow drove up in the car. They had a quart bottle that had never been opened, and another that had been opened, they had been drinking in that one; but that had a stamp on that. Above the house we found a 5-gallon jacket can with two and a half or three gallons in it; and south about 25 yards we had a stach hole down there, and we found another jug of whiskey, that was a gallon jug. They found several containers around that had had some in them. There was a trail leading out from Walter Pinkerton's premises to the edge of the woods, right where the stach was. Some of the containers actually had whiskey in them and were in places dug in the ground. About August, 1940, Mr. Sims, Mr. Jordan and I went down to Dan Pinkerton's with a search warrant. I went in the house and back in the garage; Mr. Sims was ahead of me, I followed him; Mr. Jordan was behind. When Sims got in the garage, Daniel started to run around the car with a pint of liquor, pouring it out. He said something about getting out. I didn't get in the garage where they were; he come out in the little room;

I showed him the search warrant; and he told me to get out that search warrant wasn't no good. I was standing there arguing with Dan, and about that time his wife run in and grabbed me by the arm; then Walter—he was up at the barn before we went in there—he come in the other door and pointed a rifle at Mr. Jordan and told him to get out. He said he would blow his damn brains out if he didn't get out, and he called him a son-of-a-bitch. About that time Mrs. Pinkerton, Dan's wife, turned me loose and slammed the door. Dan's wife said, 'Lordy, Mercy, don't do that;' and slammed the door in Walter's face. Dan kept the search warrant; I didn't get it back. I gave it to him to read, and he never did give it back. I had that one; he did not get any others from us. I do not know where he got these three papers you show me purporting to be search warrants. I know nothing about these three at all. On about December 7, 1940, I went back down to Dan's with Mr. Jordan and Mr. Sims with a search warrant; and we found three pints of untax-paid liquor hid down there under some boards or planks. It was in used tax-paid bottles. About May 27, 1941, I went down to Fred Agnew's home with Sheriff Jordan. Mr. Jordan let me out down there by myself. I saw Fred go down in the woods. There was a white man out at the house. He went down in the woods and brought up a pint of liquor. The sage pasture was pretty good size; and I got up in front of him and got the pint of liquor; and we went down where he come from and got two gallons of untax-paid liquor. I have seen Walter Pinkerton associating with Fred Agnew several times. I have seen Walter at Fred Agnew's house. Walter was using a Packard car on those occasions. That was the Packard that ran out of tires and was parked up at Dan's house back of a little building for a long time. About October 11, 1941, I went down to Walter Pinkerton's house with Mr.

Jordan, Corbin and Meadows and found in the house two gallons of whiskey in one-gallon glass jugs, in a back bedroom. He was there when we got there; he and his wife didn't come up after we got there. That was non-tax-paid or moonshine whiskey. During 1940 and 1941 Walter Pinkerton drove a Packard automobile; and I saw him with the Packard down at Fred Agnew's house on a number of occasions. During the years 1942 and 1943 Walter Pinkerton used a Ford V-8, 1935 or 1936 model, I believe it was a 1936 model. That is the car which was wrecked and stayed up in Dan Pinkerton's yard sometime while being repaired. That is the car the County seized as being the one used by Cornelius Porter and Walter Pinkerton about February 5, 1943 about nineteen gallons of whiskey. Walter Pinkerton never came down and made claim for that car. The County sold it under judicial process. I had seen Walter Pinkerton and Cornelius Porter riding around Fayette in that car prior to the time it was seized on more than one occasion. I don't remember ever seeing Cornelius Porter down at Fred Agnew's. About November 20, 1942, with M. H. Owen, of the Alabama Alcoholic Beverage Control Board, I investigated the premises of Fred Agnew in Fayette County. Fred and Arthur Redus went down in the woods. When Fred came back he had a pint of moonshine whiskey. We got that; and went back and got a gallon where he poured that pint out of that gallon of liquor. We made a State case against Fred for that moonshine liquor and he pleaded guilty and paid a fine. About February 5, 1943, with Sheriff Lawrence, near Ashcraft Corners, down in Fayette County near the line of Pickens County, about fifteen miles southwest of Fayette. Walter was driving a 1936 Ford. We were sitting waiting for him in a "Y". When he saw us, he backed out and lit out yonder way. At that time a school bus come through, and Travis Lawrence had to back and go this way. We went down the road two or three miles and

found his car where he had abandoned it. We found nineteen gallons of moonshine whiskey in the car in 1-gallon glass jugs. That was the same car I had seen being repaired up at Daniel's place, which had been wrecked prior thereto, and the car which was condemned through judicial process."

Thereupon, the following proceedings took place:

(By Mr. Smith:)

"Q. Did you ever go down to either's place and search for jugs, whiskey or containers that you didn't find some?"

A. (Witness) "I don't know that I ever did. You mean around Walter's?"

Q. "Around Walter's and Daniel's both?"

Mr. Tweedy:

"We object to the general question."

(Mr. Smith:)

Q. "Can you tell us about more times other than the times I specified?"

A. "We have been down there a number of times we never did make a case."

Q. "But found containers and things like that?"

A. "Yes, sir."

Q. "How about glass bottles stacked up around the garage?"

A. "He had several lots of them with the odor of whiskey in them."

Witness continued: "Dan was tried in State Court about the three pints, and according to my recollection, pleaded guilty and paid off. When he was tried for that in Federal Court in the latter part of 1941, he didn't plead guilty, but stood trial before a jury and was convicted. I don't

remember how many times Daniel Pinkerton has pleaded guilty to charges in State Court, but three or four times I would say. I would say Walter had pleaded guilty in State Court on account of moonshine whiskey about the same number of times."

Cross Examination.

By Mr. Tweedy:

Witness continued: "Those three pints were wild cat whiskey, so far as I know. Daniel pleaded guilty to the eight pints and the three pints. So far as I know, the other cases we had against Daniel Pinkerton was for State and Government stamped whiskey. He paid a fine in State Court for the eight pints and the three pints. He was convicted in Federal Court, but I don't know whether he paid a fine or what. I don't remember whether or not Daniel was in the penitentiary, at the time I got the two gallons up at Walter's about October 11, 1941. He went off to the penitentiary one time. I didn't see Dan around when we got the two gallons. I say Walter was at the house when we got the two gallons. I don't know how long he and his wife had been there beforehand. The only case made was against Walter at the time of the dispute over the search for pointing the rifle at the Sheriff. As to handing that search warrant to him: I handed him one. It had my name signed to it. I don't say that is my signature on that paper. That don't look like mine; some of it does and some doesn't. As to whether I say it is a forgery; I don't say it is mine. I don't know that that is the one I handed him."

Thereupon, Counsel for Defendants, Mr. Tweedy, stated:

"I introduce in evidence the search warrant dated May 19, 1939."

Whereupon, the Court stated: "It has already been introduced."

Witness continued: "Dan told me that search warrant I handed him wasn't legal. I didn't carry those blank search warrants already signed by Judge Moore around in my pocket. I didn't carry them around with me not filled out and fill them out later myself. That looks like Judge Moore's signature on those papers. We saw that car coming near Ashcraft Corners and got outside of the car. I was on the right side the way the car was coming. I could tell who the driver was at that time. After it went down the road and come back, I recognized the other fellow. The right window didn't have pasteboard in it. We chased it on down there, but didn't arrest Mr. Pinkerton down there. When we got to the car there was nobody there. I didn't tell Cornelius Porter that if he would tell that was Walter, we would let him off for a fine. I knew who Walter was. I reckon Cornelius paid a fine. The Court let him off; I didn't let him off. We have arrested Fred Agnew. I don't recollect seeing Dan Pinkerton down at Fred Agnew's house. I have seen Fred Agnew up at Dan Pinkerton's house. One day me and Mr. Jordan was going up the road and Fred and Walter come down the road by us. We turned around and took out after them. They went down to Dan's and drove the car right up behind the house, and there was Walter and Fred standing there. I don't say I saw Dan then. I don't remember seeing Cornelius Porter driving that 1936 Ford. I have seen him riding in it."

OSCAR P. ROMINE, a witness for the Government, after being first duly sworn, testified, as follows:

100 **Direct Examination.**

By Mr. Smith:

"My name is Oscar P Romine. I am a Special Inves-

tigator for the Alcohol Tax Unit of the United States Government. I have been Special Investigator since April 1, 1939. I have been in the service fourteen years. I have been excused from the rule and heard the testimony in regard to the Eulus Porter car transaction, which was supposed to have been transporting some whiskey. I made an examination of that car in my official capacity some week or so after that occurrence. Mr. Henry Darnell and I examined the car; and on the back floor boards, between the seats, was a mass of broken and fused glass, and underneath the glass was cardboard from corrugated cartons, from which the odor of whiskey emanated at that time. I would say it was moonshine whiskey. During the period of time I worked on this case I had frequent occasion to be around the Pinkerton farm. That lower diagram pretty clearly indicates the lay of the land out there. I have seen Walter at Dan's house and Dan at Walter's house. I was more or less an undercover operator in the investigation and took statements, including Fred Agnew and Cornelius Porter, and searched records."

Cross Examination.

By Mr. Tweedy:

Witness continued: "Walter Pinkerton used that 1936 Ford. If I recall correctly, the license was issued to him. I have seen Walter at Dan's house and Dan at Walter's house when I was passing there. They were brothers, and their mother lived with one of them, at Walter's, according to my understanding. I wouldn't say how many times I have seen Walter at Dan's house; but over a period of several months on numbers of occasions I have seen each at the other's house. I would say I have seen Walter at Dan's house as much as five times and more than that.

As to ten times, I wouldn't say about that. I have seen Dan over at Walter's house probably more than that."

(5/2/45)

M. H. OWEN, a witness for the Government, after being first duly sworn, testified as follows:

101 Direct Examination.

By Mr. Smith:

"My name is W. H. Owen. During the years 1942 and 1943 I was connected with the Alabama Alcoholic Beverage Control Board as an investigator, and did work in Fayette County. I am familiar with the Pinkerton farm. I passed there on a number of occasions. On a lot of occasions I saw automobiles parked there and signs of a lot of travel. We saw mostly negroes in the cars parked at Walter's and whites in those at Dan's. About September 4, 1942, with Sheriff Jordan, Key and Haywood I went down to Dan Pinkerton's home to assist in execution a search warrant. We found a stash in the attic of Dan's garage with, as well as I remember, 17 cases of Federal Tax Paid whiskey. On about November 20, 1942, I went to Fred Agnew's house with Mr. Key, the present Sheriff; and we hid on top of the hill in front of Fred's house and saw Fred and a negro named Redus leave the house and go to the woods. We watched them and hid on the trail they went; and when they came back we caught Fred with a pint of wildcat whiskey. We went back where he got that from and he showed us another gallon of wildcat whiskey. I know Cornelius Porter. During the time I was making my investigations I saw Walter Pinkerton and Cornelius Porter together in Pinkerton's car. I saw them

together frequently in Fayette. They were in a Ford. When I left over there the Packard automobile was in Dan's back yard. There was a trail going across the hill from Dan's to Walter's, and several trails in the woods back of both houses. We found containers back there, cans, Jugs and kegs and several smaller ones. I was along on the occasion when a 10-gallon keg and 22 pints was found behind Walter's house."

Cross Examination.

By Mr. Tweedy:

Witness continued: "I have just forgotten whether it was 17 cases or 11 or 12 cases; I had my mind on 17. After looking at this former testimony, I believe it was 11 or 12 cases. It was all tax-paid whiskey. I never found any whiskey at Dan's house which wasn't Government stamped. Dan Pinkerton paid a fine in State Court for that September 4, 1942, Federal stamp paid whiskey; I don't remember what the total amount was."

Thereupon, Counsel for Defendants, Mr. Tweedy, stated: "I introduce that in evidence."

(Defendants Exhibit No. .....)

(Trial Docket Sheet.)

(The Clerk will here insert said Exhibit.)

* * * * * * * * *

Thereupon, Counsel for the Government stated: "We have agreed to introduce the docket entries concerning Daniel Pinkerton and Walter Pinkerton in the Circuit Court of Fayette County, and also the testimony Clerk of

the Court on the former trial, which is in this book. That is done by agreement."

Whereupon, Counsel for Defendants, Mr. Tweedy, stated: "Let's identify the cases."

Whereupon, Counsel for the Government stated: "All right. We offer in evidence case No. 8087, the transaction of October 7, 1939, 8 pints, State vs. Daniel Pinkerton, in which he entered a plea of guilty, and paid a $50.00 fine. That is involved in Counts 1 and 2 of the indictment. We offer Case No. 8207, the May 29, 1940, transaction, against Walter Pinkerton, plea of guilty to violating the prohibition law; defendant pleaded guilty and fined $50.00; we offer Case No. 2043, the transaction of December 7, 1940, which is involved in Count 4, relative to Daniel Pinkerton violating the prohibition laws; pleaded guilty on March 18, 1943, fine of $50.00 and costs; we offer Case No. 2084, the transaction of October 11, 1941, Walter Pinkerton, violating the prohibition laws, pleaded guilty March 18, 1942, fine of $50.00 and costs."

Thereupon, the following proceedings took place:

Mrs. Smith: "Here is the testimony on the former trial which was agreed on."

The Court:
"Are you going to read that testimony to the jury?"

Mr. Smith:
"Yes, sir."

Mr. Tweedy:
"What page is that on, Mr. Smith?"

Mr. Smith:
"31 and 32.

The Court:
"Gentlemen of the jury, this testimony that he is going to read to you, you will take that and consider it along with the other testimony in the case. They have agreed to read this testimony given on a former trial of the case to you to save time and save putting the witness on the stand."

(Docket entries above referred to are Government Exhibits Nos. 1, 2, 3, 4. Clerk will here insert said Exhibits.)

The testimony of the Clerk of the Court on former trial is, as follows: (R. L. Moseley, Direct Examination):

"My name is R. L. Moseley. I live at Fayette, Alabama. I have been Clerk of the Circuit Court from back in 1938 to the present time. I have the files of the Court record that have been docketed against Walter and Dan Pinkerton. I have file No. 1994. Dan Pinkerton was in jail at that time on a charge of violating the prohibition law. That is the bond made on writ of habeas corpus, which bond was signed by W. F. Pinkerton, who is Walter Pinkerton, and who is a brother of Dan Pinkerton. W. E. Butler is also on the bond."

"I have the file of Court record #8207, charging Walter Pinkerton with violating the prohibition law, in which case he confessed judgment on June 29, 1940, which confession is signed by W. D. Pinkerton, who is Dan Pinkerton, the defendant in this case. That case was against Walter Pinkerton, and signed by Dan Pinkerton. I have Circuit Court file #2067, charging Walter Pinkerton with unlawfully presenting firearms. That charge is against

Walter Pinkerton, and bond signed by W. D. Pinkerton, March, 1941."

R. L. MOSELEY, a witness for the Government, after being first duly sworn, testified, as follows:

105 Direct Examination.

By Mr. Smith:

"My name is R. L. Moseley. I am Clerk of the Fayette County Circuit Court. This is the original file in case No. 8342, State vs. Walter Pinkerton. This is the warrant of arrest in that case, signed by H. W. Liddon. This is the appearance bond in the case, signed Walter Pinkerton, W. D. Pinkerton, and S. E. Pinkerton. W. D. Pinkerton is a brother to Walter. I am not positive what became of that case, but I think it was nol prossed. I do not remember why it was nol prossed."

Thereupon, Counsel for the Government introduced in evidence said warrant of arrest, and appearance bond in said case No. 8342.

(Government Exhibits Nos. .... and .....)

(The Clerk will insert said Exhibits.)

* * * * * *

Witness continued: "This the original file of the Circuit Court of Fayette County in case No. 2069. The file contains an indictment by a Circuit Court grand jury against Daniel Pinkerton, charging him with violating the prohibition laws. This is the writ of arrest. This is the appearance bond, signed by W. D. Pinkerton, principal.

Mrs. W. D. Pinkerton, his wife, and W. G. Pinkerton. The case was settled, but I don't remember how."

Thereupon, Counsel for the Government introduced in evidence said writ of arrest, indictment and appearance bond in case No. 2069.

(Government Exhibits .....)

(Clerk will insert said Exhibits.)

* * * * *

Witness continued: "This is the file down there in case No. 2084, against Walter Pinkerton. This is the folder for it. This is the search warrant in the case. This is the warrant of arrest. This is the indictment against Walter Pinkerton, charging violation of the prohibition laws, returned into Court February 25, 1942. This is the appearance bond, signed by Walter Pinkerton, George Griffin and J. S. Dodd. On the folder is, 3/18/1942, plea of guilty, $50.00."

Thereupon, Counsel for Government stated: "Let the record show that is the two gallon transaction, where it was found in Walter's back bedroom."

Thereupon, Counsel for the Government introduced in evidence the said search warrant, warrant of arrest, folder, and appearance bond in said case No. 2084. (Government Exhibit .....)

(The Clerk will insert said Exhibits.)

* * * * *

Witness continued: "This is the bond in case No. 3008, signed by Walter Pinkerton, W. D. Pinkerton and J. A. Fowler."

Thereupon, Counsel for Government introduced in evidence said bond in Case No. 3008. (Government Exhibit .....)

(The Clerk will here insert said Exhibit.)

* * * * * * * * *

Cross Examination.

By Mr. Tweedy:

Witness continued: "Some of the bonds down there were signed by Dan and another fellow, I think. Some bonds were signed by somebody other than Dan. It is not unusual to have a brother or father or someone to sign a bond for a relative in our Court. Case No. 3008 was that transportation case against Walter Pinkerton."

Thereupon, Counsel for Defendants, Mr. Tweedy, propounded the following question to the witness:

Q. "Do you have the verdict here in that case?"

Whereupon, Counsel for the Government interposed an objection to said question, stating the defendant had two trials down there in that case; the Court sustained said objection; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court, and offered to introduce in evidence verdict rendered in case No. 3008.

Whereupon, Counsel for the Government stated: "I don't have any objection to introducing the proceedings on the first trial and also the proceedings when Capt. Lawrence was not available as a witness."

Whereupon, the Court asked: "Did you introduce the entire Court file?"

Whereupon, Counsel for the Government stated: "No, sir, not that one."

Whereupon, Counsel for Government stated: "I will admit Walter was tried for the 19 gallons and convicted the first time and sentenced to three years in the penitentiary."

Whereupon, Counsel for Defendants, Mr. Tweedy, moved to exclude the statement made by Counsel for the Government; and the Court excluded said statement, stating: "I exclude that. Gentlemen, you are not to consider that statement made by the District Attorney. You will exclude that from your minds and not consider it in your consideration of this case."

(The Clerk will insert jury verdict just above referred to.)

* * * * * * * * *

Witness continued: "I was working when case No. 2069 was called. I think that Walter Pinkerton was not present in Court at that time and the Judge was about to take a forfeiture on his bond and that a settlement was made by Dan Pinkerton to keep the bond from being forfeited."

Thereupon, Counsel for Defendants, Mr. Tweedy, stated. "We have an agreement with Mr. Smith that it would not be necessary to have the Warden from Keetona up here, but it would be agreed between Mr. Smith and defendants' attorneys that Daniel Pinkerton was in the State penitentiary from June 6, 1941, to December 4, 1941, as shown by statement of O. R. Dees, Camp Keetona, which I introduce in evidence."

(Defendants' Exhibit No. .....)

(The Clerk will insert said Exhibit.)

* * * * * * * * *

JACK MANSFIELD, a witness for defendants, after being first duly sworn, testified as follows:

108 Direct Examination.

By Mr. Tweedy:

"My name is Jack Mansfield. I am now stationed at the A. F. Ried Hospital, Macon, Georgia. In October, 1941, I was over at Walter Pinkerton's house. I know about them arresting Walter for two gallons of liquor. That was my two gallons of liquor. I had been staying at Walter's house several days. I got that two gallons the night before they came and got it the next morning. I got two gallons and a quart, and I drank the quart. I spent the night before they got it in Walter's house from 11 o'clock on. I brought the liquor with me when I came in and put it in the room where I was staying. Walter and his wife did not spend the night there that night; I think they went over to his wife's mother's. I went to town the next morning and run into Eulus Porter. I had Eulus take me to town, and when we got to town I told

him to take me back out there. When we got back there, the law was there; I told him I didn't want to stop, to keep going. I had not seen Walter from the time I put the liquor in there until the law came there. Walter Pinkerton had no interest in the liquor."

Cross Examination.

By Mr. Smith:

Witness continued: "I did not help or have anything to do with stashes of liquor back in the woodland back of Walter's house. Walter and I drank some together several times. I didn't drink that whole quart that night after I got in the room. Someone helped me drink the quart, but I don't know who it was, I had never seen him before. He wasn't out at Walter's that night. I didn't say I took two gallons in two jugs and a quart of moonshine in the house. I said I got two gallons and a quart. I drank the quart, but didn't say in the house. I got it below town from a white man about 8:30 or 9 o'clock that night, but I don't know his name. I had never seen him before. That was four or five or six miles south of Fayette. It was down the New Quarters road. I have known Eulus Porter all my life. I don't recall seeing Eulus Porter and Walter Pinkerton about that time riding or associating together. I had no prior agreement that Eulus would come by and pick me up. He came by about 6:30 or 7 o'clock as he went down to work cutting timbers. He was in a Ford roadster. I never saw him in a Chevrolet. I know nothing about his Chevrolet getting burned up with 19 gallons of liquor in it. I never heard anybody talk about that. Before I got in the Army I was down at Walter's house visiting right smart. I never saw any moonshine whiskey down there. I have seen tax-paid whiskey down there. That was at Dan's, not Walter's. I don't know that I recall exactly what part of the prem-

ises it was on. I drank some there; if he had it concealed, I don't know it. I don't know about Daniel taking tax-paid whiskey bottles and filling them up from a stump hole down there back of the house. I have known Cornelius Porter all my life. I didn't see him around with Walter on different occasions. I have never seen them together at all. I know Fred Agnew when I see him. I just don't know where Fred lived. I don't recall what I paid for that two gallons; I think it was $3.00 a gallon. As to the records showing Walter paid $50.00 in that case: I come in and was going to claim it; and the day it was settled I gave Dan $100.00. I understood it was going to be settled, and it was settled. It never did come to trial. I had a three-day pass, and I went back to Maxwell Field. They didn't make a case against me. There was nobody at Pinkerton's house that night. I don't know the man who helped me consume the quart. I met him at the White Kitchen. He said he knew a man that had five gallons and he didn't want that much; I took two gallons and a quart. He was interested in buying some himself. I have not seen him since. I struck up with the strange man about five miles from Walter's house. The man that bought it carried us out there in an A model Ford. Eulus Porter was riding around in just a little two-door car at that time."

JOSIE PINKERTON, a witness for Defendants, after being first duly sworn, testified as follows:

110 Direct Examination.

By Mr. Tweedy:

"My name is Josie Pinkerton. I am the wife of Walter Pinkerton. I remember in October, 1941, when they arrested Walter for two gallons of whiskey in the house. At

that time Dan Pinkerton was in the penitentiary. At the time the officers got the whiskey, we had not spent the night at home the night before. We spent the night at my mother's. My mother's house was about 5 miles from our house At that time a soldier named Jack Mansfield was staying there a few days with us. We came home from spending the night at my mother's Saturday morning about 9 o'clock. The officers drove up when we did. Walter's mother was there then. She stayed with us. The officers made a search and found two gallons of whiskey in the house. That whiskey was not in the house to my knowledge when we left there the day before. That was not Walter's whiskey to my knowledge. We had not been back to our house from the time we left to spend the night with my mother until we drove up about the time the officers came there. We had some groceries in our car when we got out there. I remember when they claim Walter had been down in Pickens County with Cornelius Porter. They arrested Walter about 8 or 9 o'clock that night. At that time Walter had been there since about 4 o'clock. The officers had not come there at any time until they came and arrested him about 8 o'clock. I don't remember who the officers were, it was Mr. Key and a State man and somebody; there were three of them. It is about two or three hundred yards from our house to Dan's house. The houses are in sight of each other. Walter left home about 10 o'clock in the morning the day he was supposed to have gone to Pickens County."

Cross Examination

By Mr. Smith:

Witness continued: "Mr. Pinkerton and I have been living in that house four years the 9th of September; we have been married four years. I don't know when Daniel built those houses up there. I walked around the yard

and premises there. I never seen any jugs. My husband would drink bonded liquor sometimes. He got it most anywhere he could. I have never seen him get any from Dan. I have not seen my husband over at Dan's very often. I guess Dan may have come over to see us half a dozen times during the four years. I have known Mansfield about four years the coming September. I don't remember about April 15, 1941, a white man coming by my house and inquiring where Walter was and telling him he was over at Dan's. As to whether Walter and Dan both were selling whiskey down there right and left: Walter wasn't. I have never seen any moonshine whiskey around Dan's place. I have never seen any around in the woods at all. If my husband ~~ever had~~ a cotton patch, I don't know it. Looking at that diagram, and a cotton patch being cut in front of our house, that is Walter's mother's garden. Walter never even went down to the garden. Nobody walked out of the house and hid some whiskey over here one Sunday morning. I don't know that there were any tracks from directly in front of the house leading to a jug of whiskey over here. I have known Cornelius Porter about three years, maybe a little longer. Cornelius and Walter have been in the 1936 Ford together. I don't think Cornelius rode around with Walter in the Packard sedan. Something finally got wrong with the Packard and it was parked over behind Dan's place. I know Eulus Porter. He had a Chevrolet car. I seen Walter riding in Eulus Porter's Chevrolet car one time. I don't remember when it was. I know nothing about my husband carrying whiskey down to Fred Agnew's house and getting $7.50 a gallon for it. I don't know that Cornelius Porter carried whiskey down to Fred Agnew for my husband and got $7.50 a gallon for it. I saw my husband get in the car with Eulus right in front of our house; Eulus came by and picked him up. I couldn't tell you when that was. I guess that was just a short time before

Christmas, 1942; it was the day Eulus's car got burned up, I don't remember the day."

Re-Direct Examination.

By Mr. Tweedy:

Witness continued: "In regard to a man coming by the house on April 15, 1941, I wasn't married to Walter on April 15, 1941. We married in September, 1941. If any man said he talked to me at Walter's house on April 15, 1941, he is mistaken."

Re-Cross Examination.

By Mr. Smith:

Witness continued: "I am the only wife Walter ever had. I didn't know him in April, 1941."

LUTHER KEY, recalled by Defendants for further cross examination, testified as follows:

112 Cross Examination.

By Mr. Tweedy:

"As to seeing Ed Nabors down there at that car near Ashcraft Corners: I don't know which one was Ed Nabors: there was some old man and boys. There was two or three came along while I was there. We talked to a school bus driver. At the school bus I didn't tell a fellow I didn't know who was in the car when he asked me who was in it. I don't recall anybody asking me who it was."

Re-Direct Examination.

By Mr. Smith:

Witness continued: "In regard to seeing Dan with a 10-gallon keg on his shoulder back in the summer of

1939; we went up back of the house, and there was a little branch or hollow between me and him, he was on one side of the hill and me on the other; he was toting a keg out there; and when he saw us, he dropped it, but the second we started after him, he picked that keg up and run off. We were a hundred or two hundred yards from him and there was a lot of undergrowth up in the branch. We got down and went to hunting the keg; and a fellow got to shooting up that way and we heard the bullets right by us; and we left. Mr. Jordan and Mr. Sam Meadows were with me on that occasion."

Re-Cross Examination.

By Mr. Tweedy:

Witness continued: "We never got the keg. I don't know what was in the keg of my own personal knowledge. It looked like from the way he was toting it, it was heavy."

Rebuttal Examination.

By Mr. Smith:

Witness continued: "That was mighty near a quarter of a mile from his house in the woods, up above his house."

Sur-Rebuttal Examination.

By Mr. Tweedy:

Witness continued: "It was in the day time, but I wouldn't say what time of day. I never testified about that on the other trial, never mentioned it before."

Further Examination.

By Mr. Smith:

Witness continued: "I wasn't asked about it before."

Further Examination.

By Mr. Tweedy:

Witness continued: "I never told the District Attorney about it before."

Further Examination.

By Mr. Smith:

Witness continued: "I never talked to Mr. Smith before before I testified."

ED NABORS, a witness for Defendants, after being first duly sworn, testified as follows:

113 Direct Examination.

By Mr. Tweedy:

"My name is Ed Nabors. I saw Mr. Luther Key down about that car about Ashcraft Corners that day. I live in Pickens County. I remember in February, 1943, when a car with some whiskey in it was left down there. Mr. Key stopped right close to my house. A school bus came along and he was talking to the man driving the bus. I went out there. I asked Mr. Key who was in the car; and he said he didn't know. On that same night I picked up two men, and they rode about three miles with me. I know Walter Pinkerton, but he was not one of them. I didn't know Cornelius Porter at that time. I have seen him since. He was one of the men I picked up."

Cross Examination.

By Mr. Smith:

Witness continued: "I don't know who the first person was I told about having that conversation with Mr. Key.

I didn't talk about it so much. I heard about Walter getting arrested that night afterwards. I didn't see them out in the woods. I picked up Cornelius Porter in the road about a mile and a half from where they left the liquor car. I saw the car when Mr. Key and them brought it back up the road and stopped at my house with it. It looked to be a 1936 Ford. I never saw Walter Pinkerton in that car before. As to whether or not it was common knowledge down there that was Walter Pinkerton's car: I don't know whose car it was. I have been seeing Walter Pinkerton three or four years. I asked Cornelius Porter and the other man when they were riding in my car were they the ones that was in that car, and he told me yes. I don't remember how the other man looked. He was a large man about the size of Porter. He was a white man. Mr. Travis Lawrence was with Mr. Key when I asked him about who was in that car. I guess that is Capt. Lawrence who is in Italy. I didn't ask Capt. Lawrence who was in it. I knew Capt. Lawrence was Sheriff. I was standing there closer to the Deputy than the Sheriff. I didn't take the pains to ask the Sheriff if he knew either one of them. I have never been convicted for anything. I am a carpenter. I live in about three and a half miles of Joe Carroll. He is a brother of Hill Carroll. I have never been to Walter Pinkerton's house."

Re-Direct Examination.

By Mr. Tweedy:

Witness continued: "I didn't notice anything about the windows of that car."

DEWEY REYNOLDS, a witness for Defendants, after being first duly sworn, testified as follows:

114 Direct Examination.

By Mr. Tweedy:

"My name is Dewey Reynolds. I live in Pickens County. I heard the next day about some officers getting a car in February, 1943, with some whiskey in it in the edge of Pickens County near Ashcraft Corners. The night before I heard about it I picked up a couple of men down there, they come to my place, and carried them to Fayette. I know Cornelius Porter. I didn't know him at that time, but have seen him since. I know Walter Pinkerton. Walter Pinkerton was not one of the men."

Cross Examination.

By Mr. Smith:

Witness continued: Cornelius Porter was not one of the men. I didn't know either one of them. I just left my house and drove them right straight to Fayette."

Thereupon, Counsel for the Government said: "Tell Cornelius Porter to step to that door." (Cornelius Porter came to the door.)

Witness continued: "That is not him."

Re-Direct Examination.

By Mr. Tweedy:

Thereupon, Counsel for Defendants propounded the following question to the witness:

Q. "Did you talk to either one of the two fellows about a car, if they had one?"

Whereupon, Counsel for the Government interposed an objection to the question, on the grounds he said this man was not either one of them and it would not be binding. The Court sustained said objection; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to the ruling of the Court.

DALTON BARNES, a witnses for Defendants, after being first duly sworn, testified as follows:

115 Direct Examination.

By Mr. Tweedy:

"My name is Dalton Barnes. "I bought a 1936 Ford which was sold to the highest bidder in front of the Courthouse at Fayette. The glass was broken in the righthand front door and it had pasteboard in it. That was a car they claimed they caught with some whiskey in it down in Pickens County."

Cross Examination.

By Mr. Smith:

Witness continued: "It was a Fordor Ford. I don't know when the glass got knocked out. I don't know whether I ever rode around with James Walter Sims or not. I know when Daniel Pinkerton started living where he lives now in 1934. I don't remember going down to Daniel Pinkerton's home after he started living where he does now with Mr. Sims and buying two pints of moonshine whiskey from Daniel and paying $1.50 for it. That didn't happen. I have nothing against Mr. Sims. He has never arrested or bothered me. I am a good friend to Daniel Pinkerton, and a good friend to Walter, and have been through the years, so far as I know. I have been to

Walter's house. I never did see any moonshine whiskey around there. There are woods back of his house, but I have never been out in the woods there. I don't know whether he has a crib by his house or at the corner of his house. I went to his house one time and bought a Frigidaire for a friend. I never did go get any liquor there. I just wouldn't say about buying tax-paid liquor from Daniel. I never saw anybody else buy any. I have been by his house different ways, by myself and with someone. I generally rode. I have seen Walter over there several times. As to whether I have been over at Dan's drinking whiskey: well, I drink it if I can get it."

OTIS KELLEY, a witness for Defendants, after being first duly sworn, testified as follows:

116 Direct Examination.

By Mr. Tweedy:

"My name is Otis Kelley. I heard about Walter Pinkerton being arrested back in February, 1943, for transporting whiskey from Pickens County. I heard about it the next day. The day before I heard about it. I saw Walter Pinkerton in Fayette up about Mr. Robinson's store around 3 o'clock in the afternoon. He did not have his car with him at that time."

Cross Examination.

By Mr. Smith:

Witness continued: "They call me Shorty Kelley. I have known Walter Pinkerton around five or six years. I have known Cornelius Porter about the same length of time. I haven't known Eulus Porter so long; I knew he was a Porter, but was not personally acquainted with him. I couldn't say that I have seen Walter Pinkerton

and Cornelius together around Fayette. I wouldn't say I have seen Cornelius Porter in a 1936 Ford. As to whether I say I never did see him with it: I might have seen him, but I couldn't recall exactly. I have seen Walter drive that car occasionally. I have seen Walter drive a car with pasteboard in the window, but I wouldn't say it was the same car. I talked to Walter about five minutes on that occasion I spoke of. He was just passing by. There was no one present when we had the conversation. He just asked me if trucks were running out to the river to the gravel washer; I used to drive one, and he thought I was still driving, I reckon. I have never been to his house. I have not been out to get liquor from Dan. I drink."

Re-Direct Examination.

By Mr. Tweedy:

Witness continued: "I know lots of other people who drink. It is nothing unusual for people to drink liquor."

Re-Cross Examination.

By Mr. Smith:

Witness continued: "I have been getting liquor in Birmingham for years."

JIM FOWLER, a witness for Defendants, after being first duly sworn, testified as follows:

117 Direct Examination.

By Mr. Tweedy:

"My name is Jim Fowler. I live in Fayette, about a mile and a half out of Fayette. I know Walter Pinkerton. I was along out at his house when the officers ar-

rested Walter in May, 1940. We had just come from Birmingham. Walter said he bought two quarts of whiskey in Birmingham. When we drove up at his house he had a quart and about a pint in two paper pokes. I reckon the officers arrested him; they had him make bond. That was tax-paid whiskey, it had an Alabama seal on it. I did not see any other whiskey there at that time. The officers did not have any wildcat whiskey with them. The officers claimed they arrested him on that tax-paid whiskey. When Walter opened the door and started to get out of the car, he had the pokes in his hand; and Mr. Key walked out of the edge of the woods and walked down and taken the pokes out of his hand; and Mr. Jordan came up and later two more fellows came up out of the woods, I don't know who they were, they said they were State men. That was all I saw. I know Walter Sims. I didn't see him there then."

Cross Examination.

Witness continued: "I have known Walter Pinkerton since 1926 or 1927. During that period, up to April 17, 1945, I have signed one bond for him for violating the prohibition laws, I may have signed others, I wouldn't be positive. I probably signed one for Daniel. I didn't know Dan was selling whiskey out there. I have been to Dan's place. As to how many times I have been there up to April of this year: I used to go there quite often; I used to get milk out there. I never did go after liquor. I never saw any tax-paid liquor, or otherwise, there. I never saw a license on the wall saying he was a liquor dealer. I would usually drive up to the back door and get what I wanted and go on. I would go by myself. I bought both kinds of milk."

118 JOE CLIFF GILLAM, a witness for Defendants, after being first duly sworn, testified as follows:

Direct Examination.

By Mr. Tweedy:

"My name is Joe Cliff Gillam. I remember driving out to Walter Pinkerton's with Mr. Kirkley and my son who is in the army now. I saw Walter Pinkerton. I did not get any whiskey there. I did not see Dan Pinkerton there; I met him going over on the highway, just passed him. As we went out we passed Dan going in to town. Kirkley was driving that car. We left Walter's house and went back toward town. My son had a pint of whiskey when we were driving back to town. I don't know where he got it; he got it in Fayette somewhere. He had it with him as we went out to Walter Pinkerton's. That was the only pint that I saw. That was the one that was thrown out of the car. He got that in town."

Cross Examination.

By Mr. Smith:

Witness continued: "We started out to Daniel's house to get some bonded whiskey. We did not get any whiskey in that neighborhood. I just took one little drink of that liquor my son had; I don't think my son took any. Leander Guin taken a drink. We went to the well at Walter's house. My son had the whiskey with him when he was up there. He had it in his bosom in a pint bottle. I don't think he had it in a sack. I didn't see no sack. My son threw it out of the car. It was wildcat whiskey. We already had wildcat whiskey and I claim now we were going to Dan's to get bonded whiskey; we couldn't drink that wildcat. We did drink a part of it. When Luther

Key and Travis Lawrence ran up behind us, my son threw it out. I do not know from whom my son got that wild-cat whiskey. I reckon it was the first time my son had been out there; it wasn't the first time I had. The well sits at kind of the end of his house I would call it. When we couldn't get bonded liquor we decided to go get some water. I have bought liquor from Daniel; but not so many times; I don't remember how many times. I had been to Walter's house a time or two. We all got out of the car at Walter's, but we didn't go anywhere but the well. The well is kind of at the end of the house, on the righthand side. If my son gave Walter anything it was more than I seen. My son didn't give him some money. After we got some water we went back to the car. I never saw my son with no paper sack. He had a pint of whiskey in his bosom. After we hit the highway we opened the bottle. We started to drink coming back; we took a little drink out of it going out. Kirkley didn't say anything about not wanting to have anything to do with whiskey and try to get us to get rid of it. That was not the first time I had ridden with Kirkley to get whiskey. My son paid him. Sheriff Lawrence and Mr. Darnell, who is now a member of the Navy stopped us, and my son threw the whiskey out."

119 M. L. BOLTON, a witness for Defendants, after being first duly sworn, testified as follows:

Direct Examination.

By Mr. Tweedy:

"My name is M. L. Bolton. I recall about the time when Daniel Pinkerton went to the penitentiary about the middle of June, 1941, and stayed through part of December. Before then I had some dealings with him;

but since then I have had not had any dealings with him. I delivered to him some Century grain alcohol before then, which I got in Cairo, Illinois, from a licensed dealer up there. The United States government tax was paid on that alcohol. On all I delivered to Dan, the Government got its tax on it."

Cross Examination.

By Mr. Smith:

Witness continued: "I was selling it to him from Fayette. I was not doing business at Fayette, I was just hauling it to him from Cairo, Illinois. I was running a car at that time and a pickup truck sometimes. I am not retailing liquor at Tuscaloosa now. I am in the trucking business. I couldn't tell you whether Dan Pinkerton came home weekends a good many times during the time he was in the penitentiary, because about that time I went to California and stayed a couple of years. I never did see him at home then. I made several trips to Cairo, Illinois. In a car we would bring about 40 cases, in a pickup more. I never did get stopped by the law. When I got down to Dan's place I didn't put it no place; he would take the car and dispose of it himself in my car. I would take his car and go to town. I never did see him take alcohol and mix it with peach syrup."

120 WALTER PINKERTON, one of the Defendants, after being first duly sworn, testified as follows:

Direct Examination.

By Mr. Tweedy:

"My name is Walter Pinkerton. I live in Fayette County. My mother lived with me in 1939, 1940, 1941,

1942 and 1943. Coming from Fayettte you get to my house first. It is about 200 yards down the road to where I live. That road goes on up to Winfield. At the time they charge they caught Dan with two pints on his person and got six pints in a stump. I was not along when they caught him; I had no interest in that whiskey; it was not my whiskey. In reference to Count 3, charging me with having three and three-fourths gallons of distilled spirits in May, 1940, Jim Fowler and I went to Birmingham the day before, and I came home that day; I bought some whiskey at a State store in Birmingham, Jefferson County, which is a wet county; and came on into Fayette County with that liquor, which is a dry County. When I drove up at my house, Mr. Key run down from over the hill up there and arrested me; and I made bond for the whiskey they got in the car; they got a quart and what was left in a second quart which I had in the car. They did not have any other wildcat or moonshine liquor there at that time; there wasn't anything said about it at all. The liquor I got in Birmingham was State and Government tax-paid whiskey. I heard Mr. Sims say he found some wildcat just over the pasture fence about 150 or 200 yards away from the house. That fence is the boundary line of my property. There is a path that goes from my house to a spring right up the side of the wire fence on up the hill. We used that spring to get water in until I dug a well. I don't know anything about any other liquor if they found any up there; they didn't say anything about finding it. If it was across that wire fence it was on the Renfro estate. Dan was not arrested for that liquor at that time. In reference to Count 4 of the indictment, three pints of liquor found December 7, 1940, cut alcohol they claim, I was not arrested for that; that was not my liquor, and I had no interest in it; that was Dan's place where they found it. In reference to Count 5, charging two gallons of distilled spirits, October 11,

1941, Dan was in prison at that time, at Keetona, and it was sometime after that that he was released. My wife and I went to her mother's the evening before about 2 or 3 o'clock and spent the night with her mother, and came back home the next day. I drove up in the yard about the time the officers did. Jack Mansfield, a soldier, had been staying at my house some at that time. That two gallons was not my liquor; it was not there when I left; I had nothing to do with it; and didn't know anything about it. I wasn't arrested right then; they sent me a State bond later and I made bond. Dan sometimes signed bonds with me, and other people would sign them. Mansfield came to Court; I had him summoned out of the army. Morrell Montgomery was my lawyer. I was late getting to Court and got there about noon. When I got there I ascertained that my lawyer had arranged to pay a fine in the case to keep my bond from being forfeited. The fine was paid in that case. Jack Mansfield furnished the money to pay the fine. In regard to Count 6, charging concealing 1 gallon of distilled spirits in a stump down there across the road from the house, that was not my whiskey. I did not make any steps leading from my house down to that stump and back. Dan was not around at that time. There was three or four acres in a cotton patch across there, but it gets narrow on down there. It was about 75 or 100 yards to those woods from the house and across the road from it. There is a swamp over there. There is a path that goes through across that field over to the river over to the gravel washing place. In reference to Count 7, I was with Eulus Porter the night the car burned. I think we drank about a quart of bonded liquor that day. There was not 19 gallons of moonshine liquor in that car that I know of I know of no whiskey in that car, except the bonded liquor we drank. I did not have 19 gallons of whiskey in that car. That car belonged to Eulus Porter; and I

had no interest in the car. Eulus was driving the car at that time. Eulus drove in the ditch. We sat there about an hour, I guess, trying to get it out, and it wouldn't pull out. He struck a match and looked under it to see if it was down on the ground, and gas had run out of the tank, and it caught on fire. In regard to the occasion when they claim I went down to Pickens County with Cornelius Porter and got 19 gallons of whiskey: I was not with Cornelius Porter in that car. I did not drive the car down to Pickens County. I drove it from my house to his house and to Fayette. I parked the car in Fayette and went down town and eat dinner; and come back up there and the car was gone. I saw Shorty Kelley about 3 or 3:30 at Robinson's store where I left the car. I do not know whether there was any whiskey in that car. I had no interest in any whiskey in that car if somebody got it and went off and got whiskey. I got home about 4 o'clock that afternoon. My wife was there then. The officers arrested me about 8 o'clock that night. The glass in the righthand door of that car was broken out. There was pasteboard fitted there in the window. That is the car that Barnes bought up there. In regard to Count 9, charging that Dan and I sold a pint of whiskey to a soldier boy named Gillam, I did not sell any whiskey to Leander Guin, Joe Cliff Gillam or this soldier boy. They came up there and got a drink of water. No money or whiskey passed between any of us: I didn't see no whiskey. In regard to Count 11, charging a conspiracy, I never had any agreement with Dan Pinkerton, Eulus Porter, Cornelius Porter, Fred Agnew, or any other person, to sell whiskey in violation of the internal revenue laws of the United States. Dan and I are brothers. I never had any still around my house; I never saw a still in operation in my life. I never had any mash around my house. In regard to presenting a rifle at the officers, I did not have a rifle there. Some officers were making

a search at Dan's place. Key and Sims were scuffling over a search warrant with Dan; I don't remember whether Jordan was or not. Dan claimed they had no right to search. I went in the house and got a shotgun. I carried it back and set it down. I didn't point it at any of them. I don't remember whether I said anything to them or not. Mr. Jordan was standing in the door in the kitchen; and when he seed me, he run out; and Daniel's wife shut the door. I didn't tell him I would shoot his brains out or call him a son-of-a-bitch; I never did go out there. I know Fred Agnew. I never did sell him any whiskey. They say he is a crazy negro."

Cross Examination.

By Mr. Smith:

Witness continued: "I don't think I have ever been to Fed's house during 1939, 1940, 1941, 1942 and 1943. I have passed by there. Mr. Jordan stopped me and my wife down there below Fred's house one time. I have never been to his house. He has never been to my house that I know of. I have known Cornelius Porter several years. The evening before they claim he and I went to Pickens County, he came to my house, I wasn't there, and he told my wife he wanted to see me about a car. The next day I got him; I got gas right at his house, he put ten gallons in; and we went down to Fayette to Fayette Filling Station, and I had a tire fixed. He said he wanted to buy the car. As to whether I ever made a claim or any kind or description for that car after it was seized by the Sheriff and was fixing to be condemned: I never did fool with it. I testified before that I left the car parked on the street and when I went back I couldn't find it; but I don't know whether I swore the last time that I thought he had it when I missed it. I didn't talk to Cornelius about the car. I never did talk to him about

the case. I never hired a lawyer or made claim to get the car away from the law, even though I knew I hadn't used it to transport liquor. I didn't make claim for it. Fayette County sold the car. I got in the car with Eulus Porter about the middle of the day on the day of the night his car got burned up. We rode around that evening. It was about dark when he got in the ditch. All that glass that got in the back end come out of the doors, I reckon. As to the nineteen tin caps you screw on tops of jugs, I never had seen them. I don't think I looked in the back end of that car. We stayed down at a little old dance hall on the road nearly all evening. The car burned right near William Claude Smith's house, and I stayed at his house until early next morning. Before I had that 1936 Ford, I had a Packard Sedan. I don't think Cornelius Porter was ever in the Packard. I don't remember whether Cornelius had ever ridden in the 1936 Ford; he might have. Cornelius was at my house one time before we were supposed to have gone to Pickens County; I wasn't at home. He was passing going to town. I knew Dan was in the liquor business. I never sold any liquor at Dan's house. I never did know about where he kept it. I don't know whether Dan ever had spring cleaning and got rid of whiskey bottles; I never did help him. I never did see 75 or 100 or more whiskey bottles around there. When we had the ruckus with the officers, I had gone to the barn. We both use the same barn. I couldn't tell you who put empty containers, gallon jugs and 5-gallon jacket cans about my place. I couldn't tell you who made tracks in front of my house going to where whiskey was hidden. I never sold Mr. Liddon a pint of tax-paid liquor from Dan's place. I didn't sell him or anybody else any cut alcohol there. I didn't tell him it was alcohol mixed with peach syrup and it was my own mixture. I don't know Mr. Fuller. I was not at Dan's place when a white man came by and told me he stopped

at Walter's place and they told him I was at Dan's and I told him I was Walter. A conspiracy is an agreement to defraud the Government out of revenue. I don't know whether that is all it is. I never talked to Dan about violating the law down there. I never helped him in any shape or fashion to violate the law. Dan did not pay a $50.00 fine for me on a plea of guilty for the 2 gallons; I paid the fine myself the next morning; but this boy give me the money. I don't remember whether I told the law it wasn't my liquor but belonged to Jack Mansfield before I paid the fine. They never asked me. I never had Morrell Montgomery enter a plea of guilty. I think Dan was down at the Courthouse that morning. As to whether Morrell Montgomery represented Dan, too, I think he had a case in Court. I believe I remember he represented him when he was convicted for the eight pints and the three pints. We was down there to represent me about the 2 gallons; me and Jack didn't get there until about 12 o'clock, and they come to this agreement. I drank liquor with Jack Mansfield, gin. I did drink moonshine liquor over the years. I have bought gin from Dan. I never bought whiskey or cut alcohol mixed with peach syrup from him. I don't know how Dan did business. I never did go out to a car, find out what a customer wanted, go to the woods, and bring it back to him. I was sitting at the barn the day Lonnie Abbott was there. Lonnie Abbott didn't sign my bond. I never had any connection with my brother in the liquor business. The day Gillam and the others were out there, they had started to Dan's they said; they asked me if I could go up and get them a pint bottle of whiskey; I told them, "no", I didn't know nothing about where it was at. I think the officers met them on the highway. None of them gave me nothing. That was the first time I had ever seen the Gillam boy; I might have seen the others. I had never seen them out there to get any liquor before."

125 W. DANIEL PINKERTON, one of the Defendants, after being first duly sworn, testified as follows:

Direct Examination.

By Mr. Tweedy:

"My name is W. Daniel Pinkerton. As to the first count in the indictment, I had 8 pints of cut grain alcohol in October, 1939. I was arrested for that and fined in State Court. That was before I was tried in Federal Court. I was tried for it in Federal Court and paid a fine on it. That is the same 8 pints I am being prosecuted for now. Walter had nothing to do with that 8 pints. Count 2 charges removing or concealing the same 8 pints. As to Count 4, charging I had three pints, removing or concealing the same, I was arrested for that, tried for that in Federal Court, paid that off, and I think there was probation and probation set aside. It was in the same case where the 8 pints was charged. Walter had nothing to do with that 3 pints. As to Count 3, I heard about the occasion in May, 1940, when they arrested Walter when he and Jim Fowler had driven up from Birmingham. I was not present. I had nothing to with that whiskey they brought up there in that car. I had not interest in the 3 and 3/4 gallons alleged to have been found on that occasion out from Walter's house over the pasture fence. I was not charged with that. There is a pasture fence out there. If it was found on the other side of that fence, it was on land that belongs to the Renfro Estate. I had nothing to do with any whiskey back over there. When they got two gallons October 11, 1941, charged in Count 5, which was the Mansfield whiskey, I was in Jefferson County in Keetona Prison Camp, under a six months sentence. I was in prison from June 7th to December 4th, 1941. When that case came up for

trial against Walter, I was out of the penitentiary at that time. I was down at Court. When the case was called Walter wasn't there. He came in after I left. Mr. Montgomery arranged to settle that case in order to prevent a forfeiture being taken on Walter's bond. Mansfield give me $100.00, and I give it to Walter the next morning, and he paid the fine. In regard to Count 6, charging concealing 2 gallons of distilled spirits down in the swamp where tracks led from Walter's house: I know nothing about that; had no connection with it; had not interest in it; and was not arrested on that. As to Count 7, charging the transaction where Eulus Porter was driving the car that burned, alleging some whiskey was in it: I was not present at that time; and know nothing about it; and had nothing to do with it. I don't know exactly where that happened, but it was about three miles from my house. As to Count 8 charging us both with transporting, passessing or concealing 19 gallons, which is the Pickens County transaction: I was not along at that time; and had nothing to do with it. I imagine Ashcraft Corners is 12 or 15 miles from my place. I was not arrested for that transaction, nor was I arrested for the Eulus Porter transaction. As to Count 9 alleging a taxi driver drove with Gillam and a soldier boy to my home and then Walter's: I had no conversation with those people; I don't know whether they ever went to my house; and don't know what happened up there. As to the conspiracy count of the indictment: I never agreed in any way, directly or indirectly to enter into the whiskey business with Eulus Porter, Cornelius Porter, Walter Pinkerton or Fred Agnew. We all never agreed in any way whatsoever to sell whiskey or to violate the internal revenue laws of the United States. I never operated a still down there. As to this cut alcohol proposition being alcohol which had been delivered to me by Mr. Bolton: part of it was. The Government tax had been paid on

that alcohol. The tax on alcohol is more than it is on whiskey, it is twice as much. This cut alcohol was grain alcohol and water and apricot or peach syrup mixed; and that is what I have been convicted on previously; that is, those 8 pints and those 3 pints. I had a conversation with Judge Murphree and Mr. Jack McGuire since I was tried in Federal Court with reference to that since that conversation I have not used any of that alcohol and cut it up that way, diluted it any way or treated it anyway. I have been selling Government tax paid whiskey over a period of time. I have not at any time sold any moonshine whiskey. I live in a dry county. I handed you some licenses issued to me for which I paid the required amount to the Federal Government, and the Federal Government issued me licenses to sell whiskey to persons whether in a dry county or wet county. These nine licenses you hand me stamped "Retail Liquor Dealers" license are the ones given to me by the Federal Government and the ones I paid for."

Thereupon, Counsel for Defendants, Mr. Tweedy, offered in evidence the following Retail Liquor Dealers Licenses:

Retail Liquor Dealers license No. 76041, expiring June, 1936.

Retail Liquor Dealers license No. 76044, expiring June, 1937.

Retail Liquor Dealers license No. 31755, expiring June 30, 1938.

Retail Liquor Dealers license No. 156683, to W. D. Pinkerton, expiring June 30, 1939.

Retail Liquor Dealers license No. 154706, to W. D. Pinkerton, expiring June 30, 1940.

Retail Liquor Dealers license No. 87056, to W. W. Pinkerton, expiring June 30, 1941.

Retail Liquor Dealers license No. 27306, expiring June 30, 1942.

Retail Liquor Dealers license, to W. D. Pinkerton, No. 229, expiring June 30, 1943.

Retail Liquor Dealers license No. 44677, to W. D. Pinkerton, expiring June 30, 1944.

(Defendants' Exhibits .....)

(The Clerk will insert these said Exhibits.)

* * * * * * *

Witness continued: "Those were issued to me to sell tax-paid whiskey. I have been selling tax-paid whiskey. The times they spoke of me being convicted down in Fayette County, I had the retail liquor dealers licenses. I have not been operating in connection with anyone else, just for myself. Neither Walter nor these other parties ever helped me sell any whiskey or liquor. I never had any dealings with Fred Agnew. I have never been up to his house that I remember of and he has not been up to my house that I remember of. At the time the officers came to my place and started to search my premises, I got that search warrant from them; they handed me one with Mr. Key's name on it. (Looking at paper.) There was two more on the floor when they left, and I think I picked them up. I think them three is the ones I got on that date. I knew they weren't legal search warrants. I did not use a rifle on them to get them away. Walter did not point a gun at them. I filed suit against those

fellows over in Birmingham for illegally searching my premises. My mother stayed at Walter's. Our houses were about a 150 yards apart. They were not in sight of each other. There was a hill and some timber between them. There was a trail leading from my driveway down to their house. We visited one another at times. Walter and them came over to my house at times. That one trail is the only one that leads to the houses. That trail is in front; that leads from my driveway down to the front of their place. A trail from the back of Walter's house cuts across the hill to the barn. We just have one barn connected with the two houses. We have some cows we milk. The milking is done at the barn. We use the same stock, which was kept at that barn. This Packard automobile spoken of was not mine. I never did drive it or use it. Walter did the repairing on that Ford automobile; he straightened up the fenders on it. That was not my automobile. I had no interest in the Ford or Packard. I never did sell Walter Sims or Dalton Barnes any whiskey. I never sold Kilby White any moonshine whiskey. I was there when Mr. Owen came there and got 11 or 12 cases; that was Federal tax-paid whiskey. He was a State man. I don't think Mr. Darnell was along when he got the 11 cases. As to Mr. Darnell finding a jacket can in the woods up at my place and me being interested in it: nothing like that happened. The only whiskey found around my place was tax-paid whiskey. That was all I had around there. About this 10-gallon keg Mr. Key testified about: that was the first I ever heard of it, when he was on the stand. I never heard it mentioned in any case they had against me before."

Cross Examination.

By Mr. Smith:

Witness continued: "I remember being convicted by a jury in 1941 on these counts in the indictment that have

gone out because I was formerly convicted; the trial was set for December 8th, but I think it was tried on the 9th. I testified in that case. I was fined $500.00 and was to stand committed on one count and given probation on another one. I was accused then of violating the internal revenue laws of the United States on account of the alcohol I cut and mixed with peach syrup. I swore that was cut alcohol. As to whether that was the time I claim to have had a conversation with Judge Murphree and Mr. Jack McGuire, who used to be United States Attorney: yes, we talked to them. Then later through the activity of myself and Morrell Montgomery, the fine was cut to $100.00 and the probation lifted; I believe that was January, 1942. Mr. McGuire told me at that time that I couldn't sell cut alcohol or alcohol mixed with something else. I remember testifying from this witness stand about April 4, 1944, when I, my brother and others were charged with a conspiracy somewhat like the one in Count 11 of this indictment. I think I swore at that time, as follows: 'I purchased the license in Birmingham, Alabama, from a Government man; and paid full value for them.' I testified before, 'This peach stuff they were talking about, that was cut grain alcohol, and tax paid', and as to whether these pint bottles of alcohol (indicating) were cut and involved in the other transactions: This here is not cut. I testified in 1941 it was cut alcohol. At that time I was using some apricot liquor or peach liquor and putting whiskey in it; I mixed them up and put it back in a bottle. I unsealed it. In regard to testifying in April last year, 'In regard to this bottle (indicating) that they said I sold: I did sell some like it'; I sold some of that brand, yes. As to whether I can tell you how many thousands of bottles of alcohol I sold in the time I have been engaged as a retail liquor dealer: No, sir; I wouldn't say no thousands of bottles of it. I don't know how many I sold. I don't know how much

money I made during the time; I haven't got no books. I got the peach liquor to mix with the alcohol from wholesalers. I swore on April 4 or 5 last year, 'I sold some. It had a stamp on it. I did not know I was not supposed to sell anything like that; I never heard it until today. I did not know when I was buying that from wholesale liquor dealers that I could not sell it. I didn't know that I couldn't sell it under license.' After I knew I couldn't cut it and mix it with stuff, I didn't keep on mixing it."

Thereupon the following proceedings occurred:

(By Mr. Smith):

Q. "What about this man who testified you did cut some down there and sold it to him? Did you ask him whether he wanted it straight or cut? This man Liddon, did he buy this pint there?"

Mr. Tweedy:

"He didn't buy it from Dan; he didn't see Dan."

Mr. Smith:

"We will see what he said. Liddon or Fuller, one or the other—Fuller."

Q. "Do you know Mr. Fuller, a State Agent?"

A. "Yes, sir."

Witness continued: "As to whether on May 24, 1941, about 5:20 P. M., there were a lot of men in or about my place and I waited on them selling them liquor: I wouldn't say there was a lot of them there; there might have been some; I don't know how many were there. I don't remember going over to Mr. Fuller's car and asking him if there was anything I could do for him; I don't

think so. As to whether I might have done it or might not have done it: I never asked the man was there anything I could do for him. I heard Mr. Fuller testify; I never asked him nothing. I don't remember him being there at all. I don't remember asking him or anyone else on that occasion if he wanted it straight or if he wanted it mixed. As to whether at that time I was cutting grain alcohol and mixing it up: some, yes, but that was before I was tried in Federal Court. There was no cut alcohol left on my premises so Walter could sell it. There was nothing to prevent Walter from coming over to my house at any time he wanted to. I put those whiskey bottles in the attic of the garage and around the garage and around the premises; they wasn't hid. I didn't get 12 or 15 cases of grain alcohol; I got one or two cases. I have thrown empty whiskey bottles away; carried them over and put them in the hollow. Nobody saw me throw them away. I don't know how many times I have pleaded guilty and been convicted. I served six months in jail. I know Mr. Romine. I was home one time between June 7, 1941, and December 4, 1941, and stayed about two hours. I don't remember telling Mr. Romine when he was making an investigation about that time that I would get weekends off out of prison and come home. I remember talking to Mr. Romine down here in the lobby of the postoffice Monday. I don't remember telling him then that while I was supposed to be serving that time that they frequently let me out so I could come home and be around the house, and the neighbors got to raising so much cane and complaining to the State officials, they had to finally quit doing that. I didn't tell Mr. Romine that I went down there many times. On February 5, 1944, I was convicted of violating the prohibition law, for possessing 13 pints of tax-paid whiskey. I wasn't out of the penitentiary when I was supposed to be serving, except when they would give me a pass; they sent me to Birmingham

every once in awhile. I didn't stay at Keetona but six months. My sentence was six months."

"I knew I was violating the State law selling liquor down there. I didn't send Bolton to get liquor. He came around to wait on me as one of his customers at different times. I heard him testify he would go up and get it in his car and bring it to my house and leave it there in his car."

Thereupon, Counsel for the Government introduced in evidence and read to the jury the following, which was printed on the retail liquor dealers licenses heretofore offered in evidence:

"Section 3243, Revised Statute: Provided the payment of no tax imposed by the internal revenue laws for carrying on any trade or business shall not be held to exempt any person from any penalty or punishment provided by the laws of any state for carrying on the same within such state, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such state."

Witness continued:

Thereupon, Counsel for the Government propounded to the witness the following question:

Q. "Where were you the day they sold this pint of liquor from the garage at your house to Mr. Liddon and then that half a pint of peach punch or this alcohol mixed with peach syrup?"

Whereupon, Counsel for the Defendants, Mr. Tweedy, interposed an objection to said question, on the grounds it was incompetent, irrelevant and immaterial, and as-

sumes he knew it was sold; the Court overruled said objection; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

To which question the witness answered:

A. "I don't know."

Whereupon, Counsel for Defendants moved to exclude said answer of the witness, upon the same grounds assigned in objection to the question; the Court overruled said motion; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

Witness continued: "I have known Cornelius Porter about 20 years. I think I have seen Cornelius Porter and Walter together, but don't know how often. I couldn't say how many times I have seen Walter and Eulus Porter together. Walter had a 1936 model Ford. That stayed up in my lot by the barn one time. The Packard car got crippled first. The Packard was not fixed. I don't think I ever saw Walter and Cornelius Porter in the Packard together. I don't think I ever saw Cornelius at Walter's house; I don't remember. I first moved out there in 1934. I own the property I live on as well as the property Walter lives on. I own 95 acres of land. My south line comes right close to this house here (indicating on blackboard). It comes to the road here. This is the top of the hill and it extends half a mile to the right of Walter's house as you look at it from here. There are woods on down here (indicating). There is woodland in here between the houses, and a little hill in there. There is a path here going on down to the barn. Back over here for half a mile is no houses. It goes up here half a

quarter. On this side it goes nearly half a mile. This is a garden out here used by Walter's family. I had nothing to do with that gallon of whiskey found over there. I was down at Court the morning I paid the fine for Walter. They had a case against me that morning. I paid a $50.00 fine, the next morning. I did not pay mine out of the $100.00 given to me by Mansfield. The fine and costs in the Mansfield affair ran around $100.00, maybe a little over. I have known Mansfield since he was a baby I have signed Walter's bonds when he got caught, and he has signed mine. I didn't make any arrangements for a plea of guilty to be entered for Walter through Mr. Montgomery. Sometimes I don't see Walter for two or three weeks at a time. I farm besides sell liquor. Walter worked some in Mobile at a shipyard and worked some over at a shell plant in Mississippi. In cutting this alcohol I say I cut back in 1941, I would usually take two pints of alcohol and a pint of peach or apricot liquor and two pints of water and make five pints in all. I got $1.00 a pint for it when I rectified it in that manner. I do not remember an occasion when Mr. Sims same down there with Kilby White. I don't think he ever came down there with Kilby White. He has come down there by himself or somebody else, but not often. I have sold him whiskey. I don't remember whether Dalton Barnes was coming down there buying whiskey or not. I have known Dalton a long time. I wouldn't know how many customers I had a week. I have run out of liquor. I would not stay out long. Since 1935 on up to last year I hardly ever ran out of whiskey, not long at a time. I bought whiskey delivered to me in 1943. I don't know the parties who delivered it; I don't know where it was coming from. Different ones delivered it; I don't know their names. In 1942 I think it was coming from over in Mississippi. In the early part of 1941 it came from Cairo, Illinois. I have nothing at all in Court, book entries or records,

to show the quantity of liquor I bought and disposed of in 1941. As to 1940, 1941, 1942, 1943, and 1944, I haven't got any records up here. I knew I was going to be tried for conspiracy, and knew it was the second time I would be tried for conspiracy."

Thereupon, Counsel for the Government propounded to the witness the following question:

Q. "Have you got any idea how much money you made out of selling this peach stuff you refer to back in 1941?"

Whereupon, Counsel for Defendants, Mr. Tweedy, interposed an objection to the question, on the ground it was incompetent, irrelevant and immaterial; the Court overruled said objection; and Counsel for the Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

To which question the witness answered:

A. "No, sir, I don't."

Whereupon, Counsel for Defendants moved to exclude said answer, upon the ground it was incompetent, irrelevant and immaterial; the Court overruled said motion; and Counsel for Defendants, then and there in open Court, duly and legally excepted to said ruling of the Court.

Witness continued: "I understood it was a violation of the law to reuse a tax-paid bottle where the stamp had been stripped off it; that is, after 1941; I misunderstood that up until 1941. I don't think I made inquiry up until I got caught. I knew it was a violation of the law to handle non-tax paid liquor. I didn't hide non-tax paid liquor around the premises. I don't know about

the non-tax paid liquor around the barn and garage and back there that the witnesses testified about. I didn't know nothing about the keg of untax-paid liquor and 22 pints they say they found."

Thereupon, Counsel for the Government propounded to the witness the following question:

Q. "August 12, 1938, they found a keg and 22 pints of untax-paid whiskey, didn't they?"

Whereupon, Counsel for Defendants, Mr. Tweedy, interposed an objection to the question, on the grounds it was incompetent, irrelevant and immaterial, and that it was more than six years before the finding of the indictment; the Court overruled said objection; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

To which question the witness answered:

A. "I don't know."

Whereupon Counsel for the Defendants, Mr. Tweedy, moved that said answer be excluded, upon the grounds it was immaterial, irrelevant and immaterial, and more than six years before the finding of the indictment; the Court overruled said motion; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

Witness continued: "About the transaction the Court nol prossed, not ten gallons and 22 pints, no, sir."

Thereupon, the Court stated: "I let in that testimony for the purpose of showing whether or not a conspiracy existed."

Whereupon, Counsel for the Government stated: "That is the only reason I am offering it."

Witness continued: "I know H. G. Mitchell. I have had no difficulty with him, other than getting arrested by him. I remember when he was down there with Deputy Sheriff C. A. Sides, but don't remember about Charlie Tidwell. I have had no difficulty with C. A. Sides. I don't know whether it is a fact that on or about August 12, 1938, about 100 yards northeast of my house in the edge of a cotton patch there was a 10-gallon keg full of moonshine whiskey found and whether about half way between that keg and the house Mr. Mitchell found 22 pints of moonshine whiskey in a pasteboard carton. I know nothing about fresh tracks of men's shoes to and from the 22 pints of moonshine liquor out in the back between the house and the barn. I don't know anything about who put that other 10-gallon keg that had contained moonshine whiskey and that was empty and had the odor of liquor in just a little piece back of the barn. I don't know whether Mr. Mitchell or Mr. Sides found a hundred empty tax-paid whiskey bottles in the barn. I think Dalton Barnes has some trucks. I don't remember Dalton Barnes coming to my house and buying two pints of moonshine whiskey from me for which he paid $1.50. I don't know how that moonshine whiskey the officers testified about got there; a lot of it I never heard about. I heard them testify, but don't know how the liquor got there, or who put it there. There are just the two houses on my premises; nobody else lives on the premises or works my land. There were not any trails leading from where moonshine whiskey was hid to my back door or garage. As to whether they may not lead to it but lead in that direction, and as to who made the tracks: I don't know. I don't know anything about anybody putting any whiskey there. I don't claim the officers made those tracks in order to arrest

me. I knew Walter had cases made against him in County Court and State Court for violating the prohibition laws. I don't know whether he had a license from the Federal Government; I never saw one. I keep my license in my livingroom at the house. They were in the bookcase. I didn't have them tacked up on the walls. Walter has farmed there some for me. I never did authorize Walter to come over to my house and wait on trade in my absence. I have not known this fellow Gillam but a short while. He came over here with me this morning. I went over to Birmingham last week and gave his name to the Clerk to get him summonsed. Walter gave me a list of his witnesses about three weeks ago, I reckon. When I made this peach brandy or peach stuff referred to in my testimony, after opening the alcohol with the strip stamp on it and pouring some of that in another container and mixing it with peach syrup and putting it back in a pint whiskey bottle, I did not go down to the Internal Revenue office and buy liquor tax stamps and reseal that bottle up. As to whether or not I knew at that time that you couldn't sell whiskey or brandy or alcoholic beverages without a strip stamp on it evidencing the payment of all taxes due the Government and the contents of that bottle: I understand if you got a broke bottle, you can still sell it. As to whether I never did take the pains in connection with my business to find out whether I was running in violation of the law and was interested in selling liquor and making money only; No, sir. I tried to stay clear of the Government part; I didn't want to get tangled up with the Government. I did let moonshine liquor along."

At this point the Defendants rested their case.

The Government offered the following rebuttal testimony:

137 OSCAR P. ROMINE, a witness for the Government, recalled, testified as follows:

Direct Examination.

By Mr. Smith:

"I had a conversation with Daniel Pinkerton Monday. He said on that occasion that while he was supposed to be serving a term in the penitentiary for the State that he was out several times; and he stated he stayed clear of Fayette as much as he could; but I believe that he stated he was over there once."

Cross Examination.

By Mr. Tweedy:

"Mr. Newton was there at the same time I talked to him."

W. P. JORDAN, a witness for the Government, recalled, testified, as follows:

Direct Examination.

By Mr. Smith:

Thereupon, Counsel for the Government propounded the following question to the witness:

Q. "Sheriff, shortly after you took office as Sheriff of Fayette County, Alabama, on January 15, 1939, tell us whether or not on one occasion you and Mr. Key, I believe it was, your Deputy, were down there some little distance from Daniel Pinkerton's home and saw him with a keg on his back or toting a keg?"

Whereupon, Counsel for Defendants, Mr. Tweedy, interposed an objection to the question on the ground it was not in rebuttal; the Court overruled said objection; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

To which question the witness answered:

A. "Yes, sir."

Whereupon, Counsel for Defendants, moved to exclude said answer, on the ground it was not in rebuttal; the Court overruled said motion; and Counsel for Defendants, ther and there, in open Court, duly and legally excepted to said ruling of the Court.

Witness continued: "It was about 10 o'clock in the morning. I don't know what he did with the keg; he ran off with it. We never did find it. I couldn't tell whether there was anything in; but from the way he was carrying it, it looked like there was. It was a 10-gallon keg. He ran down into the bushes with it."

Thereupon, Counsel for the Government propounded the following question to the witness:

Q. "After that did somebody start shooting close to where you were?"

Whereupon Counsel for Defendants, Mr. Tweedy, interposed an objection to the question, on the ground it was incompetent, irrelevant and immaterial; the Court overruled said objection; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

To which question the witness answered:

A. "Yes, sir."

Whereupon, Counsel for the Defendants moved that said answer be excluded; the Court overruled said motion; and Counsel for Defendants, then and there, in open Court, duly and legally excepted to said ruling of the Court.

Cross Examination.

By Mr. Tweedy:

Witness continued: "I testified in this case yesterday He didn't ask me anything about that yesterday; I told what he asked me. I told about that over at Fayette before. I never told Mr. Smith about it before. I don't remember whether I told the investigating officers for the Government about it before. I told Mr. Romine about it on different occasions. He was sitting in here when I testified yesterday. I haven't made up anything against Walter Pinkerton or Dan Pinkerton. I have not been mad at him since he sued me. I speak to Pinkerton every day or two and shake hands."

Re-Direct Examination.

By Mr. Smith:

Witness continued: "I have not talked to Mr. Smith at all, except from the witness stand. I don't know that I ever met him before."

Re-Cross Examination.

By Mr. Tweedy:

"I don't know where he got the information to question me. I couldn't say whether he got it from Mr. Romine. Mr. Romine has been sitting by him. I don't know anything about whether Mr. Romine prompted him yesterday."

Thereupon, Counsel for Government stated: "I agree I didn't know anything about it until he got on the stand and Mr. Romine told me."

Witness continued: "I went in office in 1939. I don't recall just the time this occasion happened. As I told you yesterday, I can't remember dates; but it was sometime in my first year."

At this point the Government rested its case and the Defendants rested their case.

This was all the evidence in the case.

140 JUDGE MULLINS CHARGE TO THE JURY.

"Gentlemen of the jury, there are a number of separate and distinct offenses charged against each of these defendants. The defendant Walter G. Pinkerton is charged with eleven separate and distinct offenses in this indictment; and there are eight separate and distinct offenses charged against the defendant Daniel Pinkerton. There are three of these counts which are out as to Daniel Pinkerton, and those counts are Counts 1, 2, and 4 of the indictment. I instruct you at this time that you would not be authorized to convict Daniel Pinkerton under either of those counts, that is, Counts 1, 2 and 4 of the indictment; and the Clerk of the Court has written down the numbers of those counts which are out as to Dan, to show that they do not apply as to Mr. Daniel Pinkerton.

The first counts in this indictment, numbered up to 10, charge what are called substantive offenses; they charge specific violations of the internal revenue laws of the United States.

Count 11 of this indictment charges these two defendants with an unlawful conspiracy; and I am going to discuss that count with you first, that is, the conspiracy count of the indictment. That count charges that these defendants conspired with each other and with certain

other persons to violate certain Sections of the Internal Revenue Code of the United States, namely; Sections 2810, 2833, 2834, 3321, 2803, and 3253 of the Internal Revenue Code. Section 2810 of the Internal Revenue Code make it unlawful to operate a still, unless it is registered with the Internal Revenue Collector of the District in which it is located. Section 3253 which is mentioned in this count of the indictment makes it unlawful to carry on a wholesale or retail liquor business without paying a special tax that is required by law. Section 2803 makes it unlawful to transport, possess, buy or sell distilled spirits, unless the immediate containers thereof have a stamp attached to them or affixed to them denoting the quantity of liquors therein and evidencing the payment of taxes that are due to the United States Government on such liquors. Section 2833 makes it unlawful to carry on the business of a distiller without giving bond. Section 2834 makes it unlawful to ferment mash fit for the distillation or the production of distilled spirits in a building or on premises other than a distillery duly authorized by law; and, of course, an authorized distillery would be one on which bond had been given and one which had been registered with the Internal Revenue Collector in the District in which it was located. Section 3321 makes it unlawful to remove, deposit or conceal whiskey or distilled spirits on which a tax is levied, with the intent to defraud the Government out of the tax which is required to be paid on it.

I am going to read or state to you the substance of that particular count of the indictment. It is averred in Count 11, the conspiracy count, that heretofore, to-wit, continuously from, to-wit, the 12th day of August, 1938, to, to-wit, the fall of 1943, and within six years of the finding of this indictment, in the County of Fayette, in the aforesaid division of the Northern District of Alabama, and within the jurisdiction of this Court, that the defendants, did unlawfully, knowingly and wilfully combine, conspire,

confederate and agree together, with each other, and with Cornelius Porter, Eulus Porter, and Fred Agnew, who are not made defendants in this particular indictment, and with divers and sundry other persons unknown to the Grand Jurors, to commit acts made offenses and crimes against the United States by Sections 2810, 2833, 2834, 3321, 2803, and 3253 of the Internal Revenue Code of the United States, in this, that at the time and place aforesaid and within the jurisdiction aforesaid, the above named defendants did unlawfully, knowingly and wilfully conspire, combine, confederate and agree together, with each other and with divers and sundry other persons unknown to the Grand Jurors, to, separately and severally, do the following things; and the paragraphs that I will read to you at this time are the object which is averred that they unlawfully conspire to effect, that is, these are the purposes and objects of the unlawful conspiracy. There are nine of them set out in this indictment.

The first one is, unlawfully carry on the business of a distiller of spirituous liquors, without having given bond as required by the laws of the United States.

Second, unlawfully have in their possession and custody and under their control divers and sundry stills and distilling apparatuses for the production of spirituous liquors; set up without having the same registered as required by the laws of the United States.

"Third, unlawfully engage in and carry on the business of a distiller of spirituous liquors, with intent to defraud the United States of the taxes on the spirituous liquors distilled by them.

"Fourth, unlawfully work in a distillery for the production of spirituous liquors and carry and deliver raw material, to-wit, sugar and yeast, to a distillery, and to divers distilleries, upon which was no sign bearing the word "Registered Distillery".

"Fifth, unlawfully, knowingly and wilfully transport, possess, buy, sell and transfer divers and sundry quanti-

ties of distilled spirits commonly known and designated as, to-wit, whiskey, without the immediate container or containers thereof having affixed thereto stamps denoting the quantity of such distilled spirits contained therein and evidencing the payment of all Internal Revenue taxes imposed by the laws of the United States on such spirits.

"Sixth, unlawfully remove, deposit and conceal certain commodities, namely, a large quantity, to-wit, 5 gallons of distilled spirits commonly known as whiskey, for and in respect whereof a tax was then and there imposed by the laws of the United States, with intent then and there to defraud the United States of such taxes.

"Seventh, unlawfully carry on the business of a retail liquor dealer without first having paid the special tax as required by the laws of the United States.

"Eighth, unlawfully carry on the business of a wholesale liquor dealer without first having paid the special tax as required by the laws of the United States.

"Ninth, unlawfully make and ferment on premises other than a distillery duly authorized according to the laws of the United States, mash, the exact quantity being to the Grand Jurors unknown, said mash being then and there fit, suitable and intended for the distillation and production of spirits, to-wit, whiskey.

"And the Grand Jurors aforesaid, say, present and charge that it was a part and parcel of said conspiracy, combination, confederation and agreement above mentioned that overt acts in furtherance of and to effect the object of said conspiracy would be committed within the jurisdiction of this Court and at divers and sundry other places by one or more of the defendants.

"And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and charge that pursuant to said conspiracy and so to effect the object thereof, one or more of the conspirators did and caused to be done in the aforesaid Division, and within the jurisdiction of this

Court, certain overt acts; and the overt acts are set out in the indictment. There are sixteen overt acts set out altogether. You will have this indictment and you can read it. I am not going to read them all, but I will call your attention to some of them. Number 3, on or about, to-wit, January 14, 1940, W. Daniel Pinkerton possessed numerous case of empty pint tax-paid whiskey bottles and a jug labeled "Peach Syrup" and containing a small amount of syrup, which were stored in his residence and garage in Fayette County, Alabama. Four, on or about, to-wit, May 29, 1940, the defendant Walter G. Pinkerton possessed three and three-fourths gallons of non-tax paid whiskey, contained in one five gallon jacket can, one one-gallon glass jug and three pint bottles, at his residence on the W. Daniel Pinkerton farm in Fayette County, Alabama. Number 8, on or about, to-wit, May 24, 1941, W. Daniel Pinkerton was engaged in selling grain alcohol mixed with flavoring syrup and sold one pint of non-tax paid industrial grain alcohol at his home on the Pinkerton farm in Fayette County, Alabama. Number 5, on or about, to-wit, August 28, 1940, Walter G. Pinkerton, carrying a rifle, ordered State officers who were searching the W. Daniel Pinkerton residence for whiskey to leave the premises. Number 9, on or about, to-wit, October 11, 1941, the defendant, Walter G. Pinkerton possessed two gallons of non-tax paid whiskey contained in one-gallon glass jugs in his residence on the W. Daniel Pinkerton farm in Fayette County, Alabama. Number 16, during, to-wit, the month of November, 1942, the defendants carried on the business of a retail liquor dealer without first having paid the tax required by law. I haven't read all of the overt acts charged in the indictment, but I have read a number of them.

"Now I will give you this definition of a conspiracy: A conspiracy is a combination between two or more persons, by concert of action, to accomplish a criminal or un-

lawful purpose, or some purpose not in itself criminal or unlawful by criminal or unlawful means. Under that definition, of course, there must be an agreement between two or more persons to violate the law; and before a conviction can be had in a case of this kind, it is necessary for one or more of the conspirators to commit at least one of the overt acts, that is, an open act, for the purpose of effecting the object of the conspiracy. Now, there is nothing complicated about a conspiracy. The Federal Government recognizes that there is danger in a number of people getting together and making an agreement to violate the law; and Congress passed a law under which this particular count of the indictment is drawn, Section 88 of the United States Code. To make the definition of a conspiracy a little more simple for you, and to tell you what is necessary before you can convict for an unlawful conspiracy, I will state it to you this way: A conspiracy is an agreement made by two or more persons to commit a crime. That is the gist of the offense; and that is what this Section under which this prosecution is maintained is aimed at or strikes at, that is, the matter of the unlawful agreement. If two or more persons make an agreement to violate a criminal statute, that constitutes a conspiracy. However, before you can convict on the unlawful conspiracy, it is necessary in a case of this kind for the Government to aver and prove that one or more of the parties to the conspiracy committed some overt act for the purpose of effectuating the object of the conspiracy. In other words, the burden of proof in this case is on the Government to show two things, first, an unlawful agreement was made, and, second, that one or more of the parties to the agreement committed some open act, some overt act, for the purpose of carrying out the object of the conspiracy. That overt act within itself does not necessarily have to be an unlawful act. If the unlawful agreement has been made, then the conspirators, one or

more of them, might commit certain acts in furtherance of the object of the conspiracy where the acts within themselves, standing by themselves, would not be criminal. For instance, if two persons enter into an unlawful agreement or conspiracy that they will set up a still down here in the woods somewhere to make liquor for the purpose of defrauding the Government out of the taxes that are due on the liquor to be made there, after that agreement is entered into by two or more persons, then if one of them would go down and order some tin, which ordinarily in itself would be a lawful act, for the purpose of carrying the tin down and using it for the purpose of making some part of the still to manufacture liquor, then the ordering of this tin would constitute an overt act in furtherance of that conspiracy. I give that to you merely as an illustration."

"The burden of proof in this case is on the Government to satisfy you from the evidence in this case beyond a reasonable doubt that these defendants conspired with each other and with at least some of the other parties mentioned in this indictment, that is, entered into an agreement to the effect that they would commit the offenses or commit acts that are made offenses by these particular Sections of the Internal Revenue Code that are set out in this indictment; and then the burden of proof is further on the Government, after it shows that agreement was made, to satisfy you from the evidence in the case beyond a reasonable doubt that at least one of the parties to the conspiracy committed some overt act in furtherance of the object of the conspiracy."

"It doesn't take any formal agreement or any written agreement to constitute an unlawful conspiracy. It might be an implied agreement or tacit agreement. It may be an agreement that may be inferred from acts of the parties, acting in concert to accomplish the unlawful design or purpose. Unlawful conspiracies are not usually made

by written contract; and they are not usually advertised to the world."

"At this time, gentlemen of the jury, I charge you that you would have the right to look to all the statements that were made by these parties, to all of the acts of these parties, and to all of the circumstances that have been introduced in evidence in this case, for the purpose of determining whether or not these two defendants were in an unlawful conspiracy for the purpose of violating these Sections, or any one of these sections, of the Internal Revenue Code, as charged in this indictment. I place no limitation on that. There was certain evidence, principally by the Sheriff, the first witness who took the stand, but there was some evidence offered by that witness, and maybe one or two of the first witnesses in the case, as to acts of the defendants which occurred more than six years before the indictment in this case was returned. I believe the indictment was returned on the 17th day of April, 1945. Now, for the purpose of convicting these two defendants or either one of them, you would have no right to consider as an overt act in this case any act of either one of these defendants that was committed at a time which was more than six years prior to the returning of the indictment in this case, which, I believe would be about the 17th or 18th day of April, 1939. That testimony with reference to acts of the defendants which were committed more than six years before the finding of this indictment was introduced in the case, I permitted that evidence to be introduced for the limited purpose of showing whether or not a conspiracy between the defendants in this case existed and whether or not that conspiracy continued in existence until a period within the six-year statute of limitations; but, as I say to you, you could not on any of the acts which occurred more than six years prior to the time this indictment was returned, you could not use any of those acts as an overt act which would justify

you in convicting the defendants in this case. Those acts are not relevant to show guilt in this case; and to convict an overt act must be averred in the indictment and proved which occurred within the six years statute of limitations, which would be a period of six years immediately preceding the date on which the indictment was returned. As I said to you, outside of that testimony, you can look to all of the other testimony, all the facts and circumstances which have been offered in evidence, for the purpose of determining whether or not these two defendants were in an unlawful conspiracy to violate these Sections of the Internal Revenue Code, or either one of those Sections.

"I might say to you at this time, it is charged that they conspired for the purpose of committing acts which were prohibited by six different Sections of the Internal Revenue Code. It is not necessary for the Government to prove in the case that they violated all of those Sections. If you are satisfied from the evidence in this case beyond a reasonable doubt that they conspired to commit acts which violated either one of these Sections, then that would be sufficient so far as the objects of the conspiracy are concerned. What I mean to say is, gentlemen of the jury, people might enter into an unlawful conspiracy for the purpose of violating one statute or a dozen statutes; but although they agree they are going to violate a dozen statutes, it is not necessary, in order to convict in a case of this kind, for the Government to prove they violated all of the statutes. If the evidence shows they violated one criminal statute, that would be sufficient so far as the object of the conspiracy is concerned. I might also say to you as to the overt acts that are alleged in the indictment in the case, it is not incumbent on the Government to prove all of the overt acts alleged; but it is incumbent on the Government to prove, in the first place, an unlawful agreement, and, in the second place, it is necessary for the Government to prove by the evidence in the case, and satisfy you from the evidence beyond a reasonable doubt,

that at least one of the overt acts alleged in this indictment was committed by one of the parties to the conspiracy that is alleged here; and it would also be necessary for the Government to show from the evidence beyond a reasonable doubt that the object of the conspiracy was to violate at least one of these statutes, and that an overt act was committed which would constitute a violation of at least one of these statutes. It would not be necessary to show the overt acts committed violated all of these Sections.

"It is alleged here that these two defendants agreed or conspired together and that they agreed and conspired with certain other persons. Of course, as I stated to you, at least two persons must be involved in a conspiracy. In other words, a man can't conspire by himself; but it may be two or more. Of course, two men can agree they will violate the law; and in a case of this kind it is not necessary for the defendants to have any formal meeting and draw up any formal contract; and the jury is authorized in a case of this kind to draw reasonable inferences from the testimony; and there has been evidence offered in this case of a great many transactions. Those transactions isolated or standing by themselves may or may not be of much importance, but you have a right to consider all of those transactions, facts and circumstances, and take all of the transactions together; and if upon a consideration of them all you can draw an inference, and it is a reasonable inference to be drawn by reasonable men, there was in fact an unlawful agreement between these parties to carry on this liquor business down there in violation of the Federal statutes, then if you are satisfied of that from the evidence beyond a reasonable doubt, you would be authorized to convict, provided, of course, you are further satisfied from the evidence beyond a reasonable doubt at least one of the overt acts averred in this indictment have been performed.

"You have heard the evidence in this case. It is getting late; you have been here a long time; and you have been very faithful in the discharge of your duties; and I am not going to attempt to review all of the evidence in this case. There have been quite a number of witnesses who have testified here on the part of the Government, in a general sort of way, that liquor was found down there, non-tax-paid liquor on various occasions during the six years immediately preceding the date of the returning of this indictment. There is evidence here by Government witnesses that some three and a half or three and three-fourths gallons, I believe, of non-tax-paid liquor was found on one occasion, I believe that was around the immediate premises where Walter Pinkerton lived. There is other evidence here relative to a pint of liquor at the time some soldier boy and Mr. Kirkley, I believe went down to Walter Pinkerton's house. There is some testimony on the part of Government witnesses that a gallon of non-tax-paid liquor was found in a stump hole covered up with some leaves across the road from where Walter Pinkerton lived. There is evidence here on the part of the Government, I believe, that the officers went down to Mr. Daniel Pinkerton's on one occasion and testified in the case they found him with two pints, I believe, of non-tax-paid liquor and later went to a stump hole or some place near by and found six other pints there; and three pints on another occasion; and various and sundry other transactions here in the case, where the officers and other witnesses here for the Government testify they found un-tax-paid liquor; I believe in one or two instances some sort of alcohol or some sort of mixed drink made out of alcohol and peach brandy and water, and on various occasions they found those sort of liquors down there; and that in that immediate neighborhood, sometimes in the immediate vicinity of the house where Walter Pinkerton lived and sometimes in the vicinity of the house

where Mr. Daniel Pinkerton lived, they found liquor. Then there is testimony in here, for instance, in reference to an overt act or transaction when it is said three or four County officers were down there about to make a raid or making a raid when Mr. Walter Pinkerton is alleged to have, or the witnesses said he came in with a rifle, and he drew it on the Sheriff and cursed the Sheriff. You have heard all that testimony; and it is for you to take all of that testimony, all of the facts and circumstances that have been offered here, with the exception of the testimony which I limited and which I told you you should not consider, and determine from this evidence whether or not the two defendants in this case were in an unlawful conspiracy, as charged in this indictment, to violate at least one of these Sections of the Internal Revenue Code of the United States that are alleged and set out or referred to in this indictment.

"You have heard in reply to that testimony with reference to these various transactions down there, involving alcohol, or rather cut alcohol and non-tax-paid liquors, you have heard the testimony on the part of the defendants in reference to that.

"Each one of the defendants in the case pleads not guilty to each count of this indictment; that is, each count of the indictment which is left before you, all of the counts as to Walter Pinkerton and eight of the counts as to Daniel Pinkerton. Each of the defendants in the case deny that they have committed any of the offenses charged in this indictment, including the conspiracy count.

"Mr. Walter Pinkerton, briefly, testified that he was not arrested for the alcohol, when it was said that Mr. Dan Pinkerton had this eight pints of whiskey I referred to a few minutes ago; that he knows nothing about it; and had no interest in the transaction. He said he had nothing to do with removing or concealing that whiskey that is averred in Count 2 of the indictment. He said he had no interest in it or connection with it. He said as to the

three and three-fourths gallons alleged to have been found there and that the officers testified they found there at various places in May, 1940, that he had been to Birmingham and bought some tax-paid whiskey, and came back with some gentleman, I believe his name was Fowler, and he was arrested; but that was the only whiskey he had or knew anything about at that time. He said the officers didn't have any wildcat whiskey there at that time, or at least they didn't say anything about any to him; and he didn't see any. As to Count 4, three pints Dan Pinkerton was charged with, I believe in December, 1940, he said he had no interest in that transaction; and that he knew nothing about it; and was not connected with it. As to the two gallons that was found there in his bedroom, he testified, and this witness Mansfield testified, that whiskey belonged to Mansfield; it was not his; although I believe there is some evidence before you in this case that either Mr. Pinkerton or his attorney Mr. Montgomery or someone paid a fine in connection with that whiskey in Fayette County. If that whiskey was found in Walter Pinkerton's house, in fact, in his bedroom there, it would be sufficient to prima facie attribute possession of it to Mr. Walter Pinkerton; but you have evidence in the case, his statement it didn't belong to him; he didn't know anything about it; and Mansfield's statement; and, of course, it is for you to say whether or not he had any connection with it or interest in it. He said he knew nothing about the gallon of liquor found in a stump across the road from his house; he made no steps or tracks in that direction; and had no interest in that whiskey. He said he was riding with Eulus Porter at the time the Porter car was burned up, on December 17th, I believe it was, or 19th, in one of these years; and he said they had no whiskey in that car on that occasion. I believe he said they had about a quart of tax-paid whiskey and drank that before the car caught fire. As to Count 8 of the indictment, nineteen

gallons which was found in the Ford car, I believe it was, the officers in connection with that transaction testified they were on the road, I believe they called it a "Y", or something; that this car came up; they recognized Walter Pinkerton as the driver of the car; that it went back up the road and turned and started off and went in a different direction; and they later found the car with a puncture with nineteen gallons of whiskey in it; and that neither one of the parties was there when they got there.

"Going back to the transaction where they claim nineteen gallons of whiskey, or nineteen jug tops were found in the car which was burned, I believe one of the witnesses said Walter Pinkerton came to his house, and I believe he said he spent the night with him.

"Mr. Walter Pinkerton said he knew nothing about the Gillam soldier boy going out there with Kirkley in an automobile. He says he didn't sell him any whiskey. I believe he said they went to the well and got a drink of water. As I say, he denied in his testimony that he is guilty of a[illegible] of these offenses.

"The same thing is true with reference to Mr. Dan Pinkerton. The first count in this indictment is out and should not be considered against him. The same thing is true with reference to Count 2; and the same thing is true with reference to Count 4. Those are the transactions involving the eight pints and the three pints of liquor. As to the three and three-fourths gallons on May 29, 1940, referred to in Count 3, Dan Pinkerton said he heard about Walter Pinkerton and Mr. Fowler being arrested; but he was not connected with it; knew nothing about it; and had no interest in it. In regard to the Jack Mansfield transaction, or rather when the two gallons were found in Walter Pinkerton's bedroom, he said he knew nothing about that, had no interest in it; and was in prison at the time that occurred. He says he was in Court when the case against Walter was to come up or to be tried; and

you heard the evidence, what, if anything, he had to do with the transaction there at Court. He says he knew nothing about one gallon in a stump hole over across from Walter Pinkerton's house. He says he knew nothing about and had no connection with either of the transactions where it is claimed nineteen gallons were in the cars. He says he had nothing to do with the transaction at the time it is claimed Walter sold the soldier boy a pint; and he had no connection with the charge in Count 10, possession of three and a half or three and three-fourths gallons of moonshine whiskey, on which it is averred the tax had not been paid.

"They both deny they entered into any agreement to violate the law.

"Now, there is some evidence in this case that when they would be arrested down in Fayette County, that they would sign each other's bonds. You may consider that evidence in determining whether or not they were working together, in partnership, so to speak, or in an unlawful conspiracy.

"There is testimony in here with reference to automobiles, as to whom they belonged, and where they were kept, and where they were repaired. You can consider that evidence in the case. There is evidence here that these two gentlemen lived close to each other. There is evidence here that there were trails leading from their homes, one in the front and one in the back. There is evidence here that they used a common barn and used common stock. There is evidence by various witnesses that they were frequently seen together; and there is evidence here to the effect that Walter Pinkerton was seen on occasions with Fred Agnew and with these Porters, these other parties you are mentioned in this indictment and who are alleged to have been in this conspiracy. You may consider all that testimony, the fact these two gentlemen lived there close together, and associated to-

gether. Of course, that gave them an opportunity for them to get together and form a conspiracy, if they had wanted to do that. You can consider that evidence, along with all the other evidence in the case, in determining whether or not there was a conspiracy in this case.

"Mr. Dan Pinkerton says he is not guilty in this case; that he never sold anything down there, except tax-paid whiskey, I believe with the exception that he states he sold some cut alcohol down there, mixed with peach brandy and water, two pints of alcohol, two pints of water and a pint of peach liquor or brandy, whatever it is called, making five pints out of it; but he claimed he didn't sell any more of that after he was convicted here and placed on probation or given a fine in a case back about December, 1941, I believe; but he says that he was in the liquor business down there; and under his testimony I think you would have a right to find under his own statement that he was in the retail liquor business down there at his farm there near Fayette. He says, however, he didn't sell anything but tax-paid whiskey; and that he paid a retail liquor dealer's license to the Federal Governmet; and, therefore, he has committed no offense, and cannot be convicted because he did not sell anything but tax-paid liquor. Of course, under the retail liquor dealers licenses he has offered in evidence involving the time covered in the conspiracy count, that would give him a right to sell tax-paid whiskey; but that would not give him a right to sell moonshine or white whiskey manufactured in this country in the woods on which no tax has been paid; neither would that give him any right to buy alcohol, although the tax on it was paid, and take the alcohol on which the tax had been paid and then take it out of the bottles that were stamped and take it and mix it with water and other syrups, and make up an intoxicating drink, and sell that drink without the stamps being placed on the bottles in which the concoction or drink

was placed. He would have no right to take this alcohol on which tax had been paid and split it up or mix it with water and peach brandy and make up a kind of peach brandy drink and put that in bottles, whether they had been formerly used for tax-paid whiskey or not, but put it in bottles and sell it, without paying the tax required. The licenses he had in this case would not give him the right to do that. There is no evidence here, I believe, that Mr. Walter Pinkerton ever operated or attempted to operate under Mr. Daniel Pinkerton's license, as I recall the testimony. If I am wrong about this, you gentlemen correct it, because you are the sole judges of the facts in the case. He states he never did sell whiskey for Dan Pinkerton, as I recall his testimony. He said he never did sell whiskey for Dan Pinkerton; and he said, in effect, if Dan Pinkerton was running any sort of whiskey business up there, he didn't know anything about it; and he didn't sell any whiskey for him, or have anything to do with it.

"There is evidence in here by one of the witnesses, as I recall it, that he went to Dan's home on one occasion and bought a pint of tax-paid whiskey, and then asked about some of the Pinkerton Peach or this Peach whiskey that was made up, or something; and he said Walter Pinkerton was there, and he didn't see Dan Pinkerton; but it was at Dan's home, as I understood it; and he went in the house or garage, or somewhere, and brought out half a pint of this mixed drink and sold it to him; and he said that was a concoction of his own—that is Walter Pinkerton said it was a concoction of his own he had gotten up to make that mixed drink that was rectified by the defendant. If you found that to be true, that drink couldn't be sold under Mr. Daniel Pinkerton's retail liquor license, unless, of course, it was bottled and then stamps were placed on that bottle and the tax was paid on it.

"Now, gentlemen, to go back to the substantive counts in this indictment, these substantive counts are drawn

under two sections of the Internal Revenue Code. Count 1 of the substantive counts and Count 10 are drawn under Section 2803 of the Internal Revenue Code. That Section makes it an offense, as I have already stated to you, to unlawfully, knowingly and wilfully possess distilled spirits without the immediate container or containers thereof having affixed thereto a stamp denoting the quantity of such distilled spirits contained therein and evidencing the payment of all internal revenue taxes imposed by the laws of the United States on such spirits. The first Count relates to the eight pints of liquor. That is Count 1. Count 10, under that particular statute, relates to the three and three-fourths gallons of whiskey that it was testified in this case was found out there around Mr. Walter Pinkerton's home. Under Count 1, as I have already told you several times, Dan Pinkerton can't be convicted, because he has already been convicted of it. The remaining counts in the indictment, that is, the substantive counts, leaving out the conspiracy, Count 11, are drawn under Section 3321 of the Internal Revenue Code. That Section makes it an offense to remove, deposit and conceal distilled spirits, for and in respect whereof a tax was imposed by the laws of the United States, with intent to defraud the United States of such tax or any part thereof. There is a tax, as you gentlemen know, levied by the Federal Government on distilled spirits; and that tax, as are other taxes, as you know, at this time is high, I believe it runs at the rate of $9.00 a gallon. Now, under those Sections, before the defendants, or either of them, could be convicted, that is under the counts from Count 2 through Count 9, it would be necessary for the Government to show by the evidence in the case and satisfy you beyond a reasonable doubt that the particular distilled spirits referred to in those counts were removed, deposited or concealed, by the defendants, or by one of them, and that the removal, concealment or depositing was done with the intent to defraud the United States out of the tax levied

on that whiskey; and you would have to be satisfied of both of those propositions, that is, it was removed, concealed and deposited, and also it was done with the intent to defraud the United States out of the tax. You would have to be satisfied of that from the evidence beyond a reasonable doubt before you would be authorized to convict the defendants, or either of them, under Section 3321. Under Section 2803, as to Counts 1 and 10, the burden of proof would be on the Government to show that the defendants, or rather that the defendants unlawfully, knowingly and wilfully possessed distilled spirits, whiskey, and that the immediate container or containers in which the beverage of whiskies were contained did not have affixed to them a stamp denoting the quantity of such distilled spirits contained therein, and evidencing payment of the tax; and it would be necessary for the Government to show those two things by the evidence in the case to your satisfaction beyond a reasonable doubt before you would be authorized to convict. Now, as to the substantive counts in the indictment—I am talking about the first ten—of course, on 1, 2 and 4, I am sure you gentlemen understand Dan Pinkerton cannot be convicted on them —but on the remaining counts, you could convict both of the defendants in this case under each one of those counts; and you could convict one of the defendants under those counts and acquit the other defendant; or you could acquit both defendants under all of those counts. You could convict Mr. Walter Pinkerton under Counts 1, 2 and 4.

"In connection with those counts, those substantive things, after you gentlemen have considered all the evidence in this case, if you are satisfied from the evidence beyond a reasonable doubt that at the time these particular substantive offenses were committed, that is, those offenses charged in the first ten counts of this indictment if you are satisfied from the evidence beyond a reasonable doubt that the two defendants were in an unlawful

conspiracy, as I have heretofore defined unlawful conspiracy to you, then you would have a right, if you found that to be true to your satisfaction beyond a reasonable doubt, to convict each of these defendants on all these substantive counts, provided the acts referred to in the substantive counts were acts in furtherance of the unlawful conspiracy or object of the unlawful conspiracy, which you have found from the evidence existed. Of course, as I say once more, as to Counts 1, 2, and 4, Dan Pinkerton could not be convicted on those particular counts under any situation.

"The burden of proof in this case is on the Government, as I have explained to you; and these defendants are presumed to be innocent, and that presumption attends them throughout the trial of this case until such time as that presumption is overcome by the evidence and you are satisfied beyond a reasonable doubt of the guilt of the defendants. In that connection, as to what would be a reasonable doubt, I may say to you, you must be satisfied beyond a reasonable doubt before you are authorized to convict the defendants; and if after you have considered all this evidence fairly and impartially, a doubt naturally arises in your minds, as reasonable men and intelligent jurors, from the evidence or from a lack of evidence, as to the guilt of the defendants, then you have a reasonable doubt; and it would be your duty to acquit them. That would be true as to any individual, separate charge that was made. If you have a reasonable doubt as to any particular charge, it would be your duty to acquit on that particular charge.

"On the other hand, after you consider the evidence fairly and impartially, if you have an abiding conviction to a moral certainty of the guilt of a defendant, then you have no reasonable doubt; and it would be your duty to convict him as to any of the counts of the indictment as to which you have such a conviction arising out of the evidence in the case.

"You have heard the testimony; and you are the judges of the testimony. It is for you to say who has testified truthfully in this case, and who has testified falsely. Of course, you should sift the evidence and arrive at the true evidence, and then base your verdict on that testimony. It is your duty to reconcile the testimony in the case, if you can reasonably do so, to make all the witnesses speak the truth. If you cannot do that, then, as I say, it is for you to say which witnesses have told the truth, and which witnesses have testified falsely. You have got a right to consider the demeanor of the witnesses and their attitude, and whether or not they testified frankly or hesitated and apparently held back. You may consider their demeanor on the witness stand in determining the credibility you will give their testimony. You have got a right to consider the interest of any witness in the case. You have got a right to consider the interest of the defendant in this case, because if they are convicted, they would be the ones upon whom the penalty would fall. You have a right to consider their interest in the case in considering their testimony.

"Now, there is one further thing I haven't said to you. I want to say to you in connection with the transactions which are referred to in Counts 1, 2, and 4 of this indictment, under which, as I stated, Dan Pinkerton cannot be convicted on those substantive offenses, but those transactions are averred as overt acts in this conspiracy; and if you determine there was an unlawful conspiracy between these defendants, then, if you found those particular acts proven to your satisfaction beyond a reasonable doubt, you could use the overt acts referred to, which are the same transactions referred to in Counts 1, 2, and 4 of the indictment, you could use either one of those acts or transactions, if you are satisfied beyond a reasonable doubt from the evidence that it has been proven."

The Court:

"Gentlemen, what do you say about the oral charge?"

Mr. Smith:

"I am satisfied."

Mr. Tweedy:

"I want an exception to your charge as to unlawful conspiracy; each one of the defendants could be convicted; I don't think Dan could be convicted on some of the matters when he was in the penitentiary."

The Court:

"Gentlemen of the jury, at this time I am going to read to you certain written charges which have been requested by the defendants in the case, by either or both or one or the other of them. These charges state correct propositions of law; and you will take these charges and consider them along with the oral charge that has been given you in the case. They constitute part of the law in this case."

(The Court read written charges.)

The Court:

"There is no evidence showing that or tending to show that purpose of the conspiracy was accomplished."

(The Court further read written charges.)

The Court:

"I don't remember whether I defined what a retail liquor dealer was. One of the purposes averred was to conduct a retail liquor business. Every person who sells or offers for sale foreign or domestic distilled spirits, wines and malt liquors in less quantities than five gal-

lons to the same person at the same time, shall be defined as a retail liquor dealer.

(The Court further read written charges.)

The Court:

"That is Count 11, gentlemen."

(The Court further read written charges.)

The Court:

Gentlemen of the jury, there is one further thing I believe I will say to you in reference to this case. There has been a good deal of testimony in here about fines being paid or some settlements being made in County Court or State Court in Fayette County in connection with these transactions. Any fine or settlement made there would not constitute a defense to any of the charges made in this indictment. The only exception to that would be as to Daniel Pinkerton on Counts 1, 2, and 4. As I have already explained to you, he has been already convicted in this Court for that; and cannot be convicted again. Any fine or settlement made in the State Courts in Fayette County would not be a defense to the charges in this indictment.

"You have heard the testimony in his case; it has been more or less an ordeal, and probably one or two of you have been more or less under the weather; but we are through with the case now, so far as the trial is concerned; and it is time for you to take it and make up your verdict. You have heard the evidence; and if you are satisfied, under the law as given to you by the Court, that these defendants are guilty, it is your duty to convict them. If you are not so satisfied, then it is equally your duty to acquit them. I will give you forms of verdict as to each of the defendants. As to Mr. W. Daniel Pinker-

ton, if you find him guilty, the form of your verdict, the form of your verdict will be: We, the jury, find the defendant W. Daniel Pinkerton guilty as charged in Counts ..... then there is a blank line, and you fill in the counts you find him guilty under—as charged in the indictment—excluding Counts 1, 2, and 4. If you find him not guilty, the form of your verdict will be: We, the jury, find the defendant W. Daniel Pinkerton not guilty as charged in the indictment. Now, if you convict the defendant Daniel Pinkerton as to some of the Counts and not as to others, then if you will fill in the number of the counts on which you convict, then as to the counts the numbers of which are left out, he is automatically acquitted on those. The same would apply to Walter G. Pinkerton. I give you the same forms of verdict. If you find him guilty, then you would fill in the counts under which you find him guilty. If you acquit him under all the counts, use the same form of verdict I have given you: We, the jury, find the defendant Walter G. Pinkerton not guilty as charged in the indictment."

(The jury retired.)

Wherefore, the Defendants in this cause tender this as a true and correct bill of exceptions in this cause; and respectfully request that the same be accepted and approved by the Court as a true and correct bill of exceptions in said cause.

This the 28 day of June, 1945.

PENNINGTON & TWEEDY,
By J. M. PENNINGTON.

The foregoing bill of exceptions was presented to the undersigned Judge of this Court on this the 28th day of June, 1945.

CLARENCE MULLINS,
United States District Judge.

Taken and approved as a true and correct bill of exceptions in this cause on this the 30th day of June, 1945.

CLARENCE MULLINS,
United States District Judge.

Filed June 28, 1945. Chas. B. Crow, Clerk.

---

161 GIVEN CHARGES.

Filed May 2, 1945.

(Title Omitted.)

A. If you believe the evidence in this case you will find the defendant, Daniel Pinkerton, not guilty under count four of the indictment.

Given.

MULLINS,
Judge.

A1. If you believe the evidence in this case you cannot convict the defendant, Daniel Pinkerton, under count one of the indictment.

Given.

MULLINS,
Judge.

A2. If you believe the evidence in this case you cannot convict the defendant, Daniel Pinkerton, under count two of the indictment.

Given.

MULLINS,
Judge.

A13. The Court charges the jury that there is no evidence to show that the defendants did unlawfully carry on the business of a distillery of spirituous liquor as alleged in the conspiracy count of this indictment.

Given.

MULLINS,
Judge.

A14. The Court charges the jury that there is no evidence in this case that the defendants did unlawfully have in their possession and custody and under their control divers and sundry stills and distilling apparatus for the production of spirituous liquors.

Given.

MULLINS,
Judge.

A15. The Court charges the jury that there is no evidence that the defendants did unlawfully engage in or carry on a business of distilling or spirituous liquors.

Given.

MULLINS,
Judge.

A16. The Court charges the jury there is no evidence in this case that the defendants did unlawfully work in a distillery for the production of spirituous liquors and carry and deliver raw materials, to-wit, sugar and yeast, to a distillery and to divers distilleries.

Given.

MULLINS,
Judge.

18. I charge you, Gentlemen of the Jury, that the defendant, Daniel Pinkerton, had a right to sell tax paid whiskey at any time within the past three years.

Given.

MULLINS,
Judge.

A19. The Court charges the jury that Daniel Pinkerton had a retail dealers liquor license and you cannot base a conviction on him for a failure to have such a license.

Given.

MULLINS,
Judge.

A20. The Court charges the jury that there is no evidence in this case on which you can base a conviction which shows the defendant did unlawfully carry on the business of a wholesale liquor dealer as applied to this case.

Given.

MULLINS,
Judge.

A21. The Court charges the jury that the defendants cannot be convicted on the allegation that they did unlawfully make and ferment on premises other than a distillery, mash.

Given.

MULLINS,
Judge.

22. I charge you, Gentlemen of the Jury, that if Dan Pinkerton secured a federal license to sell tax-paid whiskey, he had a right to sell it at any place in Fayette County, Alabama.

Given.

MULLINS,
Judge.

A22. The Court charges the jury that the evidence does not show in this case that W. Daniel Pinkerton had in his possession a rifle.

Given.

MULLINS,
Judge.

23. The Court charges you that if any of the government's witnesses have exhibited prejudice or bias against this defendant, and satisfied you that they have not testified truly, and are not worthy of belief and you think the testimony should be disregarded, you may disregard it altogether.

Given.

MULLINS,
Judge.

A23. The Court charges the jury that if after considering all the evidence in this case you find that W. Daniel Pinkerton, so to speak the Lone Wolf, carried on his liquor dealers business by himself, without any agreement or conspiracy with any other party, then you cannot convict him under count eleven of this indictment.

Given.

MULLINS,
Judge.

24. Gentlemen, I charge you that these defendants are charged with conspiracy, and I further charge you that

conspiracy is defined to be "the confederating together or the agreement of two or more persons to accomplish some unlawful purpose or a lawful purpose by unlawful means," and unless the evidence has established such an agreement beyond all reasonable doubt, you should find the defendants not guilty of conspiracy.

Given.

MULLINS,
Judge.

25. Insofar as the evidence shows that other parties may have entered into an agreement or conspiary to violate the law as charged in the indictment, that the defendant, Dan Pinkerton, unless he made an agreement with one or more persons to violate the law as charged in the indictment, and unless the government has proved beyond a reasonable doubt, an agreement by this person to violate the law as charged in the indictment, you should find the defendant, Dan Pinkerton, not guilty of conspiracy.

Given.

MULLINS,
Judge.

A25. If the officers did not have a valid search warrant on the date they attempted to search W. Daniel Pinkerton's property, then Daniel Pinkerton had a right to use or employ such force as would be reasonably necessary to repel said search.

Given.

MULLINS,
Judge.

26. Insofar as the evidence shows that other parties may have entered into an agreement or conspiracy to vio-

late the law as charged in the indictment, that the defendant, Walter Pinkerton, unless he made an agreement with one or more persons to violate the law as charged in the indictment, and unless the government has proved beyond a reasonable doubt, an agreement by this person to violate the law as charged in this indictment, you should find the defendant, Walter Pinkerton, not guilty of conspiracy.

Given.

MULLINS,
Judge.

27. I charge you, Gentlemen of the Jury, that a conspiracy is nothing more or less than an agreement, and unless this defendant made an agreement with one or more persons to violate the law as charged in this indictment, you cannot convict him in this case, of conspiracy.

Given.

MULLINS,
Judge.

29. I charge you, Gentlemen of the Jury, to constitute a conspiracy there must be an agreement entered into between two or more persons, and if this defendant was not a party to such an agreement, you should find him not guilty of conspiracy regardless of whether he has violated the law or not.

Given.

MULLINS,
Judge.

30. I charge you, Gentlemen of the Jury, that if any witness for the government in this case has shown bias or prejudice against this defendant, and has satisfied you

that he has not testified truly in the case, you may disregard his testimony altogether, and if the guilt of the defendant depends on such testimony, then find the defendant not guilty.

Given.

MULLINS,
Judge.

31. If, after considering all the evidence in this case you believe any witness for the government has wilfully sworn falsely about any material matter, you may disregard the testimony of such witness.

Given.

MULLINS,
Judge.

32. I charge you that if any of the government's witnesses have exhibited bias or prejudice against these defendants, and satisfied you that they have not testified truly and are not worthy of belief and you think the testimony should be disregarded, you may disregard it altogether.

Given.

MULLINS,
Judge.

33. The defendants are charged with conspiracy, and I charge you that conspiracy is a corrupt agreement entered into by two or more persons, and if the evidence has failed to satisfy you beyond a reasonable doubt that defendants entered into a corrupt agreement to violate the law as charged in either count of the indictment, then you should find them not guilty of conspiracy.

Given.

MULLINS,
Judge.

34. I charge you, Gentlemen of the Jury, that if after looking at all the evidence in this case and considering it fully, your minds are left in such a state of doubt or uncertainty that you cannot say beyond a reasonable doubt that the defendant, Dan Pinkerton, is guilty of any offense charged, then this is such a doubt as would entitle this defendant, Dan Pinkerton, to an acquittal, and it would be your duty to find the defendant Dan Pinkerton, not guilty.

Given.

MULLINS,
Judge.

35. I charge, you Gentlemen of the Jury, that if after looking at all the evidence in this case and considering it fully, your minds are left in such a state of doubt or uncertainty that you cannot say beyond a reasonable doubt that the defendant, Walter Pinkerton, is guilty of any offense charged, then this is such a doubt as would entitle this defendant, Walter Pinkerton, to an acquittal, and it would be your duty to find the defendant, Walter Pinkerton, not guilty.

Given.

MULLINS,
Judge.

36. I charge you, Gentlemen of the Jury, that under the law of this country and of the United States, that it required the same amount of proof to convict the defendant of conspiracy as it does in any other criminal case, and no prejudice against the liquor traffic or against this defendant should influence you in arriving at your verdict; the fact that this indictment is filed against this defendant, is not evidence against him, and unless the evidence is sufficient to convince you beyond all reasonable doubt

of his guilt, you should give him the benefit of the doubt and find him not guilty.

Given.

MULLINS,
Judge.

37. After considering all the testimony in this case, you believe the guilt of the defendants depend upon the evidence of a witness, whose testimony you do not believe, then you should find them not guilty.

Given.

MULLINS,
Judge.

38. The defendants enter into this trial presumed to be innocent of the matters charged against them, and that presumption remains with them and will save them from conviction unless the evidence for the Government proves their guilt beyond a reasonable doubt.

Given.

MULLINS,
Judge.

40. I charge you, Gentlemen of the Jury, that the humane provision of the law is that there should never be a conviction upon circumstantial evidence unless ro a moral certainty of such evidence and to the exclusion of every other reasonable hypothesis except that of the guilt of the accused; no matter how strong the circumstances may be against the defendant if they can be reconciled that some other person may have committed the act for which the defendant is charged and that the defendant is innocent, then the guilt of the defendant is now shown by that

full measure of proof which the law in this country requires, and the jury should find a verdict of not guilty.

Given.

MULLINS,
Judge.

41. If there is a conflict in the testimony of the witnesses offered by the government, and those offered by the defendant, the jury must determine which of said witnesses they will believe; and in determining what weight they will attach to the testimony of any particular witness, they may look to the manner of such witnesses on the stand, and to his interest and feeling (if any) in the case, and as to whether or not he has been contradicted by other witnesses in the case, or by his own previous statements.

Given.

MULLINS,
Judge.

X3. The Court charges the jury that these federal retail dealer receipts in evidence authorized the defendant, Daniel Pinkerton, to sell tax-paid whiskey at retail in Fayette County insofar as the federal government is concerned.

Given.

MULLINS,
Judge.

166 REFUSED CHARGES.

Filed May 2, 1945.

1. If you believe the evidence you will find the defendants not guilty.

Refused.

MULLINS,
Judge.

2. If you believe the evidence you will find the defendant, Daniel Pinkerton, not guilty.

Refused.

MULLINS,
Judge.

3. If you believe the evidence you will find the defendant, Walter Pinkerton, not guilty.

Refused.

MULLINS,
Judge.

5. If you believe the evidence you will find the defendant Walter Pinkerton, not guilty under count 1 of the indictment.

Refused.

MULLINS,
Judge.

7. If you believe the evidence you will find the defendant Walter Pinkerton not guilty under count two of the indictment.

Refused.

MULLINS,
Judge.

8. If you believe the evidence you will find the defendant, Daniel Pinkerton, not guilty under count 3 of the indictment.

Refused.

MULLINS,
Judge.

9. If you believe the evidence you will find the defendant, Walter Pinkerton, not guilty under count 3 of the indictment.

Refused.

MULLINS,
Judge.

10. If you believe the evidence you will find the defendant, Walter Pinkerton, not guilty under count 4 of the indictment.

Refused.

MULLINS,
Judge.

11. If you believe the evidence you will find the defendants not guilty under count 5 of the indictment.

Refused.

MULLINS,
Judge.

12. If you believe the evidence you will find the defendants not guilty under count 6 of the indictment.

Refused.

MULLINS,
Judge.

A12. If, after considering all the evidence in this case, you find that Daniel Pinkerton only handled whiskey on which the government tax had been paid or alcohol on which the government tax had been paid, then you cannot convict the defendant, W. Daniel Pinkerton, on the first ten counts of this indictment.

Refused.

MULLINS,
Judge.

13. If you believe the evidence you will find the defendants not guilty under count 7 of the indictment.

Refused.

MULLINS,
Judge.

14. If you believe the evidence you will find the defendants not guilty under count 8 of the indictment.

Refused.

MULLINS,
Judge.

15. If you believe the evidence you will find the defendants not guilty under count 9 of the indictment.

Refused.

MULLINS,
Judge.

16. If you believe the evidence you will find the defendants not guilty under count 10 of the indictment.

Refused.

MULLINS,
Judge.

17. If you believe the evidence you will find the defendants not guilty under count 11 of the indictment.

Refused.

MULLINS,
Judge.

A17. The Court charges the jury that there is no evidence in this case to show that the defendant, Daniel Pinkerton, did unlawfully, knowingly, and wilfully transport, possess, buy, sell, and transfer divers and sundry quantities of distilled spirits, commonly known and designated as, to-wit, whiskey, within the immediate container or containers thereof having been affixed thereto stamps denoting the quantity of such distilled spirits contained therein and evidencing the payment of all Internal Revenue taxes imposed by the laws of the United States on such spirits, and there are no such facts on which to base a conviction of W. Daniel Pinkerton on that charge.

Refused.

MULLINS,
Judge.

A18. The Court charges the jury that there is no evidence in this case to show the defendant, W. Daniel Pinkerton, did unlawfully remove, deposit, and conceal certain commodities, to-wit, five gallons of distilled spirits commonly known as whiskey.

Refused.

MULLINS,
Judge.

19. I charge you, Gentlemen of the Jury, the fact, if it is a fact, that Dan Pinkerton possessed 8 pints of non-tax paid whiskey, contained in 8 pint tax paid whiskey

bottles, at his residence in Fayette County, Alabama, on, to-wit, October 7, 1939, is no evidence against him for the crime charged in this indictment; and you are not to consider that fact, if it be a fact.

Refused.

MULLINS,
Judge.

20. The fact, if it be a fact, that the defendant had whiskey bottles and a jug labeled "peach syrup" on January 14, 1940, more than three years before this indictment was returned, is not evidence sufficient to convict this defendant of the crime charged in this indictment.

Refused.

MULLINS,
Judge.

21. The fact, if it be a fact, that the defendant, Dan Pinkerton, possessed 3 pints of non-tax paid whiskey mixed with coca-cola syrup contained in tax-paid whiskey bottles on or about December 7, 1940, more than three years before this indictment was found, is no evidence against him on the charge made in this indictment.

Refused.

MULLINS,
Judge.

A24. The Court charges the jury that there is no evidence in this case to show W. Daniel Pinkerton had any agreement or conspiracy to violate the Internal Revenue law with Fred Agnew.

Refused.

MULLINS,
Judge.

28. I charge you, Gentlemen of the Jury, that a conspiracy is nothing more nor less than an agreement, and unless the defendant made an agreement with one or more persons to violate the law as charged in this indictment, you cannot convict him in this case of conspiracy, and in saying whether or not he is guilty you are not authorized to take into consideration any fact which may have occurred more than three years prior to the finding of this indictment.

Refused.

MULLINS,
Judge.

39. I charge you that any testimony in this case, about any transaction that happened before April 14th, 1942, cannot be considered by you to show guilt of the defendant for said transaction.

Refused.

MULLINS,
Judge.

B. If you believe the evidence in this case you will find the defendant, Daniel Pinkerton, not guilty under count five of the indictment.

Refused.

MULLINS,
Judge.

C. If you believe the evidence in this case you will find the defendant, Daniel Pinkerton, not guilty under count six of the indictment.

Refused.

MULLINS,
Judge.

D. If you believe the evidence in this case you will find the defendant, Daniel Pinkerton, not guilty under count seven of the indictment.

Refused.

MULLINS,
Judge.

E. If you believe the evidence in this case you will find the defendant, Daniel Pinkerton, not guilty under count eight of the indictment.

Refused.

MULLINS,
Judge.

F. If you believe the evidence in this case you will find the defendant, Daniel Pinkerton, not guilty under count nine of the indictment.

Refused.

MULLINS,
Judge.

G. If you believe the evidence in this case you will find the defendant, Daniel Pinkerton, not guilty under count ten of the indictment.

Refused.

MULLINS,
Judge.

H. If you believe the evidence you will find the defendant, Daniel Pinkerton, not guilty under count eleven of the indictment.

Refused.

MULLINS,
Judge.

I. If you believe the evidence in this case you will find defendant, Walter Pinkerton, not guilty under count four of the indictment.

Refused.

MULLINS,
Judge.

J. If you believe the evidence in this case you will find the defendant, Walter Pinkerton, not guilty under count five of the indictment.

Refused.

MULLINS,
Judge.

K. If you believe the evidence in this case you will find the defendant, Walter Pinkerton, not guilty under count six of the indictment.

Refused.

MULLINS,
Judge.

L. If you believe the evidence in this case you will find the defendant, Walter Pinkerton, not guilty under count seven of the indictment.

Refused.

MULLINS,
Judge.

M. If you believe the evidence in this case you will find the defendant, Walter Pinkerton, not guilty under count eight of the indictment.

Refused.

MULLINS,
Judge.

N. If you believe the evidence you will find the defendant, Walter Pinkerton, not guilty under count nine of the indictment.

Refused.

MULLINS,
Judge.

O. If you believe the evidence in this case you will find the defendant, Walter Pinkerton, not guilty under count ten of the indictment.

Refused.

MULLINS,
Judge.

P. If you believe the evidence in this case you will find the defendant, Walter Pinkerton, not guilty under count eleven of the indictment.

Refused.

MULLINS,
Judge.

---

172 NOTICE OF APPEAL.

Filed May 9, 1945.

In the District Court of the United States for the Jasper Division of the Northern District of Alabama.

United States of America
vs.
W. Daniel Pinkerton and Walter G. Pinkerton.

Name and address of Appellants:

W. Daniel Pinkerton, Fayette, Alabama, R. F. D. 2 Box 38.

Walter G. Pinkerton, Fayette, Alabama; R. F. D. 2 Box 38.

Name and Address of Appellants' Attorneys:

R. L. Newton, Jasper, Alabama.

Pennington & Tweedy, Jasper, Alabama.

Curtis & Maddox, Jasper, Alabama.

Offense:

Count 1—Illegal possession of 8 pints of whiskey.

Count 2—Unlawfully removing, depositing, and concealing 8 pints of whiskey.

Count 3—Unlawfully removing, depositing, and concealing 3 3/4 gallons of distilled whiskey.

Count 4—Unlawfully removing, depositing, and concealing 3 pints of whiskey.

Count 5—Unlawfully removing, depositing, and concealing 2 gallons of whiskey.

Count 6—Unlawfully removing, depositing, and concealing 1 gallon of whiskey.

Count 7—Unlawfully removing, depositing, and concealing 19 gallons of whiskey.

Count 8—Unlawfully removing, depositing, and concealing 19 gallons of whiskey.

Count 9—Unlawfully removing, depositing, and concealing 1 pint of whiskey.

Count 10—Illegal possession of 3 3/4 gallons of whiskey.

Count 11—Conspiracy under Title 18, Section 88 United States Annotated, to commit the acts made offenses and crimes against the United States by Section 2810, 2833, 2834, 3321, 2803, and 3253.

Date of Judgment.

May 3, 1945.

Brief Description of Judgment or Sentence:

For W. Daniel Pinkerton thirty (30) months imprisonment in the penitentiary under Counts 3, 5, 6, 8, 9, and 10, and a fine of One Thousand Dollars ($1,000.00), and two (2) years imprisonment in the penitentiary under Count 11 to run concurrently with the thirty months sentence and a Five Hundred Dollar ($500.00) fine; for Walter G. Pinkerton thirty (30) months imprisonment in the penitentiary under Counts 1, 2, 3, 4, 5, 6, 8, 9, 10, and a Five Hundred Dollar ($500.00) fine, and two (2) years imprisonment in the penitentiary under Count 11 to run concurrently with the thirty months sentence.

Name of Prison where now Confined:

Walker County, Alabama, jail, Jasper, Alabama.

We, the above-named Appellants, hereby separately and severally appeal to the United States Circuit Court of Appeals for the Fifth Circuit from the Judgment above-mentioned on the grounds set forth below.

Grounds:

Among the grounds upon which the appeal is grounded is, (a) Overruling of the dumurrer to the indictment; (b) Overruling objection to the admission of certain testimony to be set out and designated in the Bill of Exceptions; (c) Refusal of the Court to give, at the request of Appellants, certain charges in writing; (d) Sustaining demurrer to plea of former jeopardy #A.

W. DANIEL PINKERTON,
WALTER G. PINKERTON,
Appellants.
R. L. NEWTON,
CURTIS & MADDOX,
PENNINGTON & TWEEDY,
Attorneys for Appellants.

Dated: May 7, 1945.

---

174 ASSIGNMENTS OF ERROR.

(Title Omitted.)

Now comes W. Daniel Pinkerton and Walter G. Pinkerton, separately and severally, and make and file, separately and severally, the following assignments of error:

1. The Court erred in overruling the separate demurrers of the separate defendants to the indictment in this case.

2. The Court erred in overruling the separate demurrers of the separate defendants to Counts 1, 2, 3, 4, 5, 6, 7, 8, and 9 of the indictment, separately and severally.

3. In the statement to the jury on behalf of defendants it was stated by Counsel for the defendants, explaining the sale of cut alcohol by one of the defendants who had retail license to sell tax paid liquor, as follows:

"We expect the evidence to show you he did not know he could not sell that under the retail liquor dealers license he had."

Counsel for the Government objected to the statement on the ground that the law presumed he knew. The Court erred in sustaining said objection to said statement made on behalf of the defendants.

4. Counsel for the defendants further stated:

"We also expect the evidence to show on behalf of Dan that he had a sentence put on him for the eight pints and the three pints; that since that time he learned he couldn't sell it that way; and since that time he has not sold cut alcohol; and has not had any cut alcohol—that was in December, 1941—and further that he had an undestanding with Assistant District Attorney Jack McGuire and also Judge Murphree at that time there would be no further prosecution brought against him on that stuff."

Counsel for the Government objected to the statement on the ground that neither one have authority under the law to make such an agreement. The Court erred in sustaining said objection of the Counsel for the Government to said statement.

5. The Court erred over the separate objection of defendants in permitting and allowing witness H. G. Mitchell to answer the following question, namely:

Q. "Did you ever go out there in connection with your official duties in connection with whiskey?"

To which the witness answered:

A. "Yes, sir."

6. The Court erred in permitting the District Attorney, over the separate objection of each defendant, to propound to witness H. G. Mitchell the following question and in failing to exclude the answer thereto, which was as follows:

Q. "What did you find on those occasions, Sheriff?"
A. "Well, the way things were being handled, the whiskey was handled, surrounding the house—"

7. The Court erred in permitting the District Attorney, over the separate objection of each defendant, to propound to witness Mitchell the following question and in refusing to exclude the answer upon motion, which said question was as follows:

Q. "Who was making the sales?"
A. "Daniel Pinkerton."

8. The Court erred in permitting the District Attorney, over the objection of each defendant, to propound to the witness Mitchell the following question, and in refusing to exclude the answer upon motion, which said question was:

Q. "What kind of whiskey was he selling?"
A. "Wildcat whiskey."

9. The Court erred in refusing to exclude from the jury the evidence given by witness Mitchell, on the

grounds that the evidence given was not within the statute of limitations, and which questions were as follows:

Q. "Let me ask you this: your term of office ended January 15, 1939, didn't it?"

A. "Yes."

Q. "What you are testifying about happened before that?"

A. "Yes, sir, it was before."

10. The Court erred in that the matter inquired about was not within the statute of limitations to answer the following question:

Q. "You said something about finding liquor, take this and point out there just where you did find it?"

A. "Well, right here by the barn was a little trail coming down there, and there was staches there, where they hollowed the ground and leaves on it."

11. The Court erred in permitting the District Attorney, over the separate objections of the defendants, on the grounds that the transaction inquired about was not within the statute of limitations to ask witness Mitchell the following question:

Q. "Will you tell the jury how many times you found whiskey out in the thicket?"

A. "The cases made, was a pint; and one case here by the barn; another case is below the road where there is a broom sage patch; and they got some whiskey down here; and there was one time out above this little pine thicket, by the yard, just heavy underbrush in there, and got a pint out of that place one time."

12. The Court erred in overruling the motion of the defendants separately to exclude from the jury the above answer.

13. The Court erred in refusing to exclude from the jury on the motion of the defendants separately, the answer made to the following question on the grounds that it was more than six years prior to the finding of the indictment, which said question was as follows:

Q. "I believe you said you saw Dan handling whiskey, what was that, moonshine whiskey he was delivering?"
A. "Yes, sir."

14. The Court erred, over the objection of the defendants, separately, in permitting the United States Attorney to ask the witness Mitchell the following question, on the ground that it was a transaction more than six years before the finding of the indictment, namely:

Q. "What size containers would it be in?"
A. "Making sales, pints."
"Whiskey bottles."

15. The Court erred in overruling the motion of defendants to exclude the answer made to the question propounded in the preceding assignment.

16. The Court erred in permitting the United States Attorney, over the objections of the defendants, to answer the following question and in refusing to exclude same on motion of defendants, on the ground that it occurred more than six years before the finding of the indictment, which question was as follows:

Q. "Was that tax sealed or moonshine whiskey?"
A. "Moonshine whiskey."

17. The Court erred in permitting the United States Attorney, over the objections of the defendants, to ask

the witness Mitchell the following question, and in refusing to exclude the answer, on the ground that the transaction occurred more than six years before the finding of the indictment, which said question was as follows:

Q. "And the keg you found was moonshine?"
A. "Yes, sir."

18. The Court erred in permitting the United States Attorney, over the objections of the defendants, to ask the witness Mitchell the following question and in refusing to exclude the answer thereto, on the grounds that it was more than six years before the finding of the indictment, which question was as follows:

Q. "Do you recall any occasion when you saw anybody go to the staches you mentioned and get whiskey and make deliveries of it?"
A. "Yes, sir."

19. The Court erred in permitting the United States Attorney to ask the witness Mitchell the following question, over the objections of the defendants, and in refusing to exclude the answer thereto, on the grounds that same was more than six years before the finding of the indictment, which question was as follows:

Q. "What kind of whiskey was that?"
A. "Moonshine whiskey."

20. The Court erred in permitting the United States Attorney to ask the witness Mitchell the following question, and in refusing to exclude the answer thereto, on the ground that the transaction was more than six years before the finding of the indictment:

Q. "You said you had seen sales made, were they made from down in the thicket or up at the house?"

A. "The thicket and near the house."

21. The Court erred in permitting the United States Attorney to ask the witness Mitchell, over the objections of the defendants, the following question and in refusing to exclude the answer thereto, on the ground that the same occurred more than six years before the finding of the indictment, which question was as follows:

Q. "Did you ever make a raid there on some occasion and find approximately a hundred empty whiskey bottles that had at one time contained tax-paid whiskey?"

A. "Yes, sir."

22. The Court erred in permitting the United States Attorney, over the objections of the defendants, to ask the witness Mitchell the following question and in refusing to exclude the answer therefrom, on the ground that the same occurred more than six years before the finding of the indictment, namely:

Q. "What did it smell like?"

A. "Wildcat whiskey."

23. The Court erred in permitting the United States attorney to ask the witness Mitchell, over the objections of the defendants, the following question, and in refusing to exclude the answer on motion of defendant, on the ground that same occurred more than six years before the finding of the indictment, namely:

Q. "Did you ever see any cars out at Dan Pinkerton's house?"

A. "Yes, sir."

24. The Court erred in permitting the United States attorney, over the objections of the defendants, to ask the witness Mitchell the following question, and in refusing to exclude the answer thereto, on the ground that same occurred more than six years before the finding of the indictment, namely:

Q. "How long did they stay there?"
A. "Just a few minutes."

25. The Court erred in permitting the United States attorney, over the objections of the defendants, to ask the witness Mitchell the following question, and in refusing to exclude the answer thereto, on the ground that it occurred more than six years before the finding of the indictment, namely:

Q. "Did you see Dan take anything to a car while you were there, deliver anything to a customer?"
A. "Yes, sir, occasionally."

26. The Court erred in permitting the United States attorney to ask the witness Mitchell the following question, over the objections of the defendants, and in refusing to exclude the answer thereto, on the ground that the transaction occurred more than six years before the finding of the indictment, namely:

Q. "What did it look like he delivered?"
A. "I would see him make a trip to the car and back out to the thicket and then back to the car; of course, to see anything else, I couldn't see that."

27. The Court erred in permitting the United States Attorney to ask the witness Mitchell the following question, over the objections of the defendants, and in refusing

to exclude the answer thereto, on the grounds that it was incompetent and more than six years before the finding of the indictment, namely:

Q. "Did he plead guilty in some?"
A. "Yes, sir, he settled off one of them."

28. The Court erred in sustaining the objections of the United States attorney to the following question propounded by the attorney for the defendants to witness R. L. Mosely, Clerk of the Circuit Court of Fayette County, and in charge of its official files, which question was as follows:

Q. "Do you have the verdict here in that case?"

29. The Court erred in permitting the United States attorney to ask the defendant Dan Pinkerton, over the objection of the attorney for the defendants, the following question, and in refusing to exclude the answer thereto, namely:

Q. "Have you got any idea how much money you made out of selling this peach stuff you refer to back in 1941?"
A. "No, sir, I don't."

30. The Court erred in refusing to give, at the request of the defendant, before the jury retired, the following charge in writing, namely:

"1. If you believe the evidence you will find the defendants not guilty."

31. The Court erred in refusing to give, at the request of the defendant, before the jury retired, the following charge in writing, namely:

"2. If you believe the evidence you will find the defendant, Daniel Pinkerton, not guilty."

32. The Court erred in refusing to give, at the request of the defendant, before the jury retired, the following charge in writing, namely:

"3. If you believe the evidence you will find the defendant, Walter Pinkerton, not guilty."

33. The Court erred in refusing to give, at the request of the defendant, before the jury retired, the following charge in writing, namely:

"5. If you believe the evidence you will find the defendant, Walter Pinkerton, not guilty under count 1 of the indictment."

34. The Court erred in refusing to give, at the request of the defendant, before the jury retired, the following charge in writing, namely:

"7. If you believe the evidence you will find the defendant, Walter Pinkerton, not guilty under count two of the indictment."

35. The Court erred in refusing to give, at the request of the defendant, before the jury retired, the following charge in writing, namely:

"8. If you believe the evidence you will find the defendant, Daniel Pinkerton, not guilty under count 3 of the indictment."

36. The Court erred in refusing to give, at the request of the defendant, before the jury retired, the following charge in writing, namely:

"9. If you believe the evidence you will find the defendant, Walter Pinkerton, not guilty under count 3 of the indictment."

37. The Court erred in refusing to give, at the request of the defendant, before the jury retired, the following charge in writing, namely:

"10. If you believe the evidence you will find the defendant, Walter Pinkerton, not guilty under count 4 of the indictment."

38. The Court erred in refusing to give, at the request of the defendant, before the jury retired, the following charge in writing, namely:

"11. If you believe the evidence you will find the defendants not guilty under count 5 of the indictment."

39. The Court erred in refusing to give, at the request of the defendant, before the jury retired, the following charge in writing, namely:

"12. If you believe the evidence you will find the defendants not guilty under count 6 of the indictment."

40. The Court erred in refusing to give, at the request of the defendant, before the jury retired, the following charge in writing, namely:

"A12. If, after considering all the evidence in this case, you find that Daniel Pinkerton only handled whiskey on which the government tax had been paid or alcohol on which the government tax had been paid, then you cannot convict the defendant, W. Daniel Pinkerton, on the first ten counts of this indictment."

41. The Court erred in refusing to give, at the request of the defendant, before the jury retired, the following charge in writing, namely:

"13. If you believe the evidence you will find the defendants not guilty under count 7 of the indictment."

42. The Court erred in refusing to give, at the request of the defendant, before the jury retired, the following charge in writing, namely:

"14. If you believe the evidence you will find the defendants not guilty under count 8 of the indictment."

43. The Court erred in refusing to give, at the request of the defendant, before the jury retired, the following charge in writing, namely:

"15. If you believe the evidence you will find the defendants not guilty under count 9 of the indictment."

44. The Court erred in refusing to give, at the request of the defendant, before the jury retired, the following charge in writing, namely:

"16. If you believe the evidence you will find the defendants not guilty under count 10 of the indictment."

45. The Court erred in refusing to give, at the request of the defendant, before the jury retired, the following charge in writing, namely:

"17. If you believe the evidence you will find the defendants not guilty under count 11 of the indictment."

46. The Court erred in refusing to give, at the request of the defendant, before the jury retired, the following charge in writing, namely:

"A17. The Court charges the jury that there is no evidence in this case to show that the defendant, Daniel Pinkerton, did unlawfully, knowingly, and wilfully transport, possess, buy, sell, and transfer divers and sundry quantities of distilled spirits, commonly known and designated as, to-wit, whiskey, within the immediate container or containers thereof having been affixed thereto stamps denoting the quantity of such distilled spirits contained therein and evidencing the payment of all Internal Revenue taxes imposed by the laws of the United States on such spirits, and there are no such facts on which to base a conviction of W. Daniel Pinkerton on that charge."

47. The Court erred in refusing to give, at the request of the defendant, before the jury retired, the following charge in writing, namely:

"A18. The Court charges the jury that there is no evidence in this case to show the defendant, W. Daniel Pinkerton, did unlawfully remove, deposit, and conceal certain commodities, to-wit, five gallons of distilled spirits commonly known as whiskey."

48. The Court erred in refusing to give, at the request of the defendant, before the jury retired, the following charges in writing, namely:

"19. I charge you, Gentlemen of the Jury, the fact, if it is a fact, that Dan Pinkerton possessed 8 pints of non-tax paid whiskey, contained in 8 pint tax paid whiskey bottles, at his residence in Fayette County, Alabama, on, to-wit, October 7, 1939, is no evidence against him for the crime charged in this indictment, and you are not to consider that fact, if it be a fact."

49. The Court erred in refusing to give, at the request of the defendant, before the jury retired, the following charges in writing, namely:

"20. The fact, if it be a fact, that the defendant had whiskey bottles and a jug labeled "peach syrup" on January 14, 1940, more than three years before this indictment was returned, is not evidence sufficient to convict this defendant of the crime charged in this indictment."

50. The Court erred in refusing to give, at the request of the defendant, before the jury retired, the following charge in writing, namely:

"21. The fact, if it be a fact, that the defendant, Dan Pinkerton, possessed 3 pints of non-tax paid whiskey mixed with coca-cola syrup contained in tax-paid whiskey bottles on or about December 7, 1940, more than three years before this indictment was found, is no evidence against him on the charge made in this indictment."

51. The Court erred in refusing to give, at the request of the defendant, before the jury retired, the following charge in writing, named:

"A24. The Court charges the jury that there is no evidence in this case to show W. Daniel Pinkerton had any agreement or conspiracy to violate the Internal Revenue law with Fred Agnew."

52. The Court erred in refusing to give, at the request of the defendant, before the jury retired, the following charge in writing, namely:

"28. I charge you, Gentlemen of the Jury, that a conspiracy is nothing more nor less than an agreement, and unless the defendant made an agreement with one or

more persons to violate the law as charged in this indictment, you cannot convict him in this case of conspiracy, and in saying whether or not he is guilty you are not authorized to take into consideration any fact which may have occurred more than three years prior to the finding of this indictment."

53. The Court erred in refusing to give, at the request of the defendant, before the jury retired, the following charge in writing, namely:

"39. I charge you that any testimony in this case, about any transaction that happened before April 14th, 1942, cannot be considered by you to show guilt of the defendant for said transaction."

54. The Court erred in refusing to give, at the request of the defendant, before the jury retired, the following charge in writing, namely:

"B. If you believe the evidence in this case you will find the defendant, Daniel Pinkerton, not guilty under count five of the indictment."

55. The Court erred in refusing to give, at the request of the defendant, before the jury retired, the following charge in writing, namely:

"C. If you believe the evidence in this case you will find the defendant, Daniel Pinkerton, not guilty under count six of the indictment."

56. The Court erred in refusing to give, at the request of the defendant, before the jury retired, the following charge in writing, namely:

"D. If you believe the evidence in this case you will find the defendant, Daniel Pinkerton, not guilty under count seven of the indictment."

57. The Court erred in refusing to give, at the request of the defendant, before the jury retired, the following charge in writing, namely:

"E. If you believe the evidence in this case you will find the defendant, Daniel Pinkerton, not guilty under count eight of the indictment."

58. The Court erred in refusing to give, at the request of the defendant, before the jury retired, the following charge in writing, namely:

"F. If you believe the evidence in this case you will find the defendant, Daniel Pinkerton, not guilty under count nine of the indictment."

59. The Court erred in refusing to give, at the request of the defendant, before the jury retired, the following charge in writing, namely:

"G. If you believe the evidence in this case you will find the defendant, Daniel Pinkerton, not guilty under count ten of the indictment."

60. The Court erred in refusing to give, at the request of the defendant, before the jury retired, the following charge in writing, namely:

"H. If you believe the evidence you will find the defendant, Daniel Pinkerton, not guilty under count eleven of the indictment."

61. The Court erred in refusing to give, at the request of the defendant, before the jury retired, the following charge in writing, namely:

"I. If you believe the evidence in this case you will find the defendant, Walter Pinkerton, not guilty under count four of the indictment."

62. The Court erred in refusing to give, at the request of the defendant, before the jury retired, the following charge in writing, namely:

"J. If you believe the evidence in this case you will find the defendant, Walter Pinkerton, not guilty under count five of the indictment."

63. The Court erred in refusing to give, at the request of the defendant, before the jury retired, the following charge in writing, namely:

"K. If you believe the evidence in this case you will find the defendant, Walter Pinkerton, not guilty under count six of the indictment."

64. The Court erred in refusing to give, at the request of the defendant, before the jury retired, the following charge in writing, namely:

"L. If you believe the evidence in this case you will find the defendant, Walter Pinkerton, not guilty under count seven of the indictment."

65. The Court erred in refusing to give, at the request of the defendant, before the jury retired, the following charge in writing, namely:

"M. If you believe the evidence in this case you will find the defendant, Walter Pinkerton, not guilty under count eight of the indictment."

66. The Court erred in refusing to give, at the request of the defendant, before the jury retired, the following charge in writing, namely:

"N. If you believe the evidence you will find the defendant, Walter Pinkerton, not guilty under count nine of the indictment."

67. The Court erred in refusing to give, at the request of the defendant, before the jury retired, the following charge in writing, namely:

"O. If you believe the evidence in this case you will find the defendant, Walter Pinkerton, not guilty under count ten of the indictment."

68. The Court erred in refusing to give, at the request of the defendant, before the jury retired, the following charge in writing, namely:

"P. If you believe the evidence in this case you will find the defendant, Walter Pinkerton, not guilty under count eleven of the indictment."

R. L. NEWTON,
J. J. CURTIS,
PENNINGTON & TWEEDY,
Attorneys for Appellants.

Filed on June 28th, 1945.

CLARENCE MULLINS,
United States District Judge.

187 APPEAL BOND.

Know All Men By These Presents: That we, W. Daniel Pinkerton as principal, and ..... as sureties, are held and firmly bound unto the United States of America in the full and just sum of Twenty Hundred ($2000.00) Dollars, to be paid to the said United States of America, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 2 day of May, in the year of our Lord one thousand nine hundred and forty five.

Whereas, lately at the January Term, A. D., 1945, of the District Court of the United States, for the Jasper Division of the Northern District of Alabama, in a suit pending in said Court between the United States of America, plaintiff, and W. Daniel Pinkerton has filed notice of appeal to the United States Circuit Court of Appeals for the Fifth Circuit to reverse the judgment and sentence in the aforesaid suit, and a copy of said notice of appeal directed to the said United States of America, has been duly served.

Now, the condition of the above obligation is such, that if the said W. Daniel Pinkerton shall appear in the United States Circuit Court of Appeals for the Fifth Circuit, on the first day of the Present term thereof, to be held at the city of New Orleans, Louisiana, on the first Monday in October, A. D., 1945, and from day thereafter during said term and from term to term and from time to time, until finally discharged therefrom, and shall abide by and obey all orders made by the said United States Circuit Court of Appeals for the Fifth Circuit, in said cause, and

shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if the judgment and sentence of the said District Court against him shall be affirmed by the said United States Circuit Court of Appeals for the Fifth Circuit, then the above obligation to be void, else to remain in full force, virtue and effect.

(Seal) W. D. PINKERTON,
Principal.

(Seal) REUBEN L. NEWTON,
Surety.

(Seal) J. D. BARNES,
Surety.

Approved:
CLARENCE MULLINS,
Judge of the United States District Court, Northern District of Alabama.

Filed May 2, 1945. Chas. B. Crow, Clerk, United States District Court, Northern District of Alabama.

I, Reuben L. Newton, depose and say that I am a surety on the within bond; that I am a householder and a freeholder in the Northern District of Alabama; that I am worth in unincumbered real estate the sum of Six Thousand ($6000.00) Dollars over and above all my just debts and legal liabilities.

REUBEN L. NEWTON,
Surety.

Sworn to and subscribed before me this 2nd day of May, 1945.

CHAS. B. CROW.
(Seal) Clerk.

I, J. D. Barnes, depose and say that I am a surety on the within bond; that I am a householder and a freeholder in the Northern District of Alabama; that I am worth in unincumbered real estate the sum of Six Thousand ($6000.00) Dollars over and above all my just debts and legal liabilities.

J. D. BARNES,
Surety.

Sworn to and subscribed before me this 2 day of May, 1945.

CHAS. B. CROW,
(Seal) Clerk.

---

189 APPEAL BOND.

Know All Men By These Presents: That we, Walter Pinkerton, as principal, and ....., as sureties, are held and firmly bound unto the United States of America in the full and just sum of Twenty Hundred ($2,000.00) Dollars, to be paid to the said United States of America, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 2 day of May, in the year of our Lord one thousand nine hundred and forty-five.

Whereas, lately at the January Term, A. D., 1945, of the District Court of the United States, for the Jasper Division of the Northern District of Alabama, in a suit pending in said Court between the United States of America, plaintiff, and Walter Pinkerton has filed notice of appeal to the United States Circuit Court of Appeals for the

Fifth Circuit to reverse the judgment and sentence in the aforesaid suit, and a copy of said notice of appeal directed to the said United States of America, has been duly served.

Now, the condition of the above obligation is such, that if the said Walter Pinkerton shall appear in the United States Circuit Court of Appeals for the Fifth Circuit, on the first day of the Present term thereof, to be held at the City of New Orleans, Louisiana, on the first Monday in October, A. D. 1945, and from day thereafter during said term and from term to term, and from time to time, until finally discharged therefrom, and shall abide by and obey all orders made by the said United States Circuit Court of Appeals for the Fifth Circuit, in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if the judgment and sentence of the said District Court against him shall be affirmed by the said United States Circuit Court of Appeals for the Fifth Circuit, then the above obligation to be void, else to remain in full force, virtue and effect.

(Seal) WALTER PINKERTON,
Principal.

(Seal) REUBEN L. NEWTON,
Surety.

(Seal) J. D. BARNES,
Surety.

Approved:
CLARENCE MULLINS,
Judge of the United States District Court, Northern District of Alabama.

Filed May 2, 1945. Chas. B. Crow, Clerk, United States District Court, Northern District of Alabama.

I, Reuben L. Newton, depose and say that I am a surety on the within bond; that I am a householder and a freeholder in the Northern District of Alabama; that I am worth in unincumbered real estate the sum of Six Thousand ($6,000.00) Dollars over and above all my just debts and legal liabilities.

REUBEN L. NEWTON,
Surety.

Sworn to and subscribed before me this 2nd day of May, 1945.

CHAS. B. CROW,
(Seal) Clerk.

I, J. D. Barnes, depose and say that I am a surety on the within bond; that I am a householder and a freeholder in the Northern District of Alabama; that I am worth in unincumbered real estate the sum of Six Thousand ($6,000.00) Dollars over and above all my just debts and legal liabilities.

J. D. BARNES,
Surety.

Sworn to and subscribed before me this 2nd day of May, 1945.

CHAS. B. CROW,
(Seal) Clerk.

190 CLERK'S CERTIFICATE.

The United States of America,
Northern District of Alabama.

I, CHAS. B. CROW, Clerk of the District Court of the United States for the Northern District of Alabama, Jasper Division, do hereby certify that the foregoing pages numbered from one (1) to one hundred eighty nine (189), both inclusive, are a full, true, and correct transcript of the record on appeal, in the matter of W. Daniel Pinkerton, alias Dan Pinkerton, alias W. D. Pinkerton, and Walter G. Pinkerton, alias Walter Pinkerton, alias W. G. Pinkerton, Appellants, versus The United States of America, Appellee, as fully as the same does appear of record and on file in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of said Court, at Birmingham, in said District, this 27th day of August, A. D., 1945.

CHAS. B. CROW,
Clerk, United States District Court, Northern District of Alabama.

(Seal)

[fol. 242] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

SUBMISSION OF CASE ON RECORD AND BRIEFS

Extract from the Minutes of October 16, 1945

No. 11379

W. DANIEL PINKERTON and WALTER G. PINKERTON

versus

UNITED STATES OF AMERICA

On this day this cause was called, and, was taken under submission by the Court upon the record and briefs on file.

[fol. 243] OPINION OF THE COURT—Filed October 30, 1945

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 11379

W. DANIEL PINKERTON and WALTER G. PINKERTON, Appellants

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the Northern District of Alabama

(October 30, 1945)

Before Sibley and McCord, Circuit Judges, and Kennamer, District Judge

KENNAMER, District Judge:

Walter and Dan Pinkerton, appellants, with other named defendants who are not parties to this appeal, were indicted by a grand jury on ten substantive counts and one conspiracy count for violations of the Internal Revenue Laws

of the United States of America. Demurrer was filed by [fol. 244] both appellants to the indictment, which demurrer was overruled by the trial judge. A plea in abatement was filed by Dan Pinkerton as to counts 1, 2, and 4, of the indictment, and was sustained. A plea in abatement by both appellants to count 11 of the indictment was overruled. The trial court submitted the case to the jury on all counts of the indictment as to Walter Pinkerton; and on counts three, five, six, seven, eight, nine, ten, and eleven as to Dan Pinkerton.

A jury verdict of guilty on all counts of the indictment except count seven was returned against Walter Pinkerton, and against Dan Pinkerton on counts three, five, six, eight, nine, ten, and eleven.

Each of the defendants was given a prison sentence and fine, and both have appealed.

The appellee, United States of America, filed a motion to dismiss appellants' appeal in this court on the ground that the notice of the taking of the appeal was filed too late. Due to the peculiar facts relating to the filing of the notice of the taking of the appeal, and since the case is being affirmed on the merits, the court makes no decision on the motion to dismiss the appeal; it being the view of the court that in such action the appellee obtains the same result as it seeks by the motion to dismiss the appeal, and there is no injury to the appellants.

Counts 1 and 10 of the indictment were barred by the statute of limitations of 3 years and the demurrer as to these counts should have been sustained.

Counts 2, 3, 4, 5, 6, 8, and 9 of the indictment charge that the appellants did unlawfully remove, deposit and conceal certain commodities, namely, a large quantity of distilled spirits, naming the quantity in each count, whereof a tax [fol. 245] was then and there imposed by the laws of the United States, with intent then and there to defraud the United States of such tax.

Numerous assignments of error are made by the appellants and, although none are waived, certain ones are called specially to the attention of the court. The assignments of error which go to the question of the defendant Walter being guilty under the substantive counts of the indictment for which the defendant Dan had plead guilty and with which he had nothing to do; or the defendant Dan being

guilty under certain substantive counts of the indictment while in the penitentiary; or that both of these defendants could not be found guilty in either of the first ten counts of the indictment, as each count charges a separate offense and on the trial were treated as separate indictments, and that the testimony that would show one of the appellants committed the offense in one count, would show that the other appellant had nothing to do with it, are not sustained in law and are without merit.

The appellants, as disclosed by the record, are brothers. They reside about two hundred yards from each other, on the same side of the highway, on a farm which was owned by Dan Pinkerton. There was a pathway connecting their houses, and there was frequent association between the two. On one ocasion when officers of the law were making an investigation at Dan Pinkerton's place, Walter Pinkerton drew a gun on the sheriff and threatened to kill him. Whenever Walter Pinkerton was arrested in the State courts of Fayette County, his brother Dan would make his bond. They have both been engaged in the business of selling whiskey and have been arrested and convicted many times for violating the liquor laws. Walter Pinkerton admitted buying liquor in a wet county and bringing it into a dry county in violation of State law.

[fol. 246] In deciding the guilt or innocence of the defendants on the several counts charging substantive offenses, the jury could weigh all the foregoing circumstances in determining whether these two appellants were in fact in a conspiracy in the acts that constitute the violations in the manner and form set out in the counts charging substantive offenses, and this would be true if there had been no conspiracy count in the indictment.

"Although conspiracy be not charged, if it be shown by the evidence to exist, the act of one or more defendants in furtherance of the common plan is in law the act of all." *Davis v. United States*, 12 Fed. (2nd) 253.

Count 11 of the indictment charged a conspiracy on the part of the appellants, with others, to combine, conspire, confederate, and agree together to commit the acts made offenses and crimes against the United States by sections 2810, 2833, 2834, 3321, 2803, and 3253, of the Internal Revenue Code of the United States. Sixteen overt acts were

set out as having been done by one or more of the conspirators pursuant to said conspiracy and to effect the object of the conspiracy. Some of the overt acts in the conspiracy count are the same acts set out in the counts charging substantive offenses. However, there was no error in overruling appellants' demurrer to this count or sustaining the government's demurrer to the plea in abatement as to this count.

"A conspiracy is an agreement or understanding between two or more parties to do an unlawful thing, or to do a lawful thing in an unlawful manner." Words & Phrases, Vol. 8, page 718.

[fol. 247] "The conspiracy is complete on the forming of the criminal agreement, and the performance of at least one overt act in furtherance thereof." *Hall v. United States*, 109 Fed. (2nd) 976.

Some of the overt acts of the conspiracy count of the indictment were beyond the three year period of the statute of limitations; however, other overt acts were alleged and evidence produced upon which a verdict of guilty could be sustained in which the period of limitation is six years and these overt acts were alleged and proved to have occurred within the six year period.

The trial court, in its oral charge, gave the jury full and clear instructions as to the rules of law and evidence that was to guide them in their consideration of the case. Counsel for appellants took one exception to the oral charge in this language: "I want an exception to your charge as to unlawful conspiracy, each one of the defendants could be convicted; I don't think Dan could be convicted on some of the matters when he was in the penitentiary." There was no merit in this exception.

The defendants requested of the trial court, in writing, to give seventy-two separate charges to the jury. Thirty-three of these written charges were given by the court. The refused written charges were mostly separate requests for a directed verdict under each of the separate counts of the indictment. Since the punishment imposed was less than was authorized under any single count charging a substantive offense, if there was any error in the refusal of any [fol. 248] single requested charge it was error without injury.

Judgment Affirmed.

[fol. 249] JUDGMENT

Extract from the Minutes of October 30, 1945

No. 11379

W. DANIEL PINKERTON and WALTER G. PINKERTON,

versus

UNITED STATES OF AMERICA

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Alabama, and was taken under submission by the Court upon the record and briefs on file;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

[fol. 251] ORDER DENYING REHEARING

Extract from the Minutes of December 1, 1945

No. 11379

W. DANIEL PINKERTON and WALTER G. PINKERTON,

versus

UNITED STATES OF AMERICA

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 252] [Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 253] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 4, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

FILE COPY

Office - Supreme Court, U. S.
FILED
JAN 5 1946
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

NO. 719

W. DANIEL PINKERTON AND
WALTER G. PINKERTON,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HARVEY DERAMUS,
JOHN S. TUCKER, JR.,
R. L. NEWTON,
THOMAS E. SKINNER,
Counsel for Petitioners.

INDEX.

TABLE OF CONTENTS.

	Page
Petition	1
Questions presented	2
Summary statement of matter involved	2
Reasons why a writ of certiorari should issue	6
Prayer	7
Brief in suport of petition	8
Opinions below	8
Jurisdiction	8
Statement of the case	8
Specifications of errors to be urged	8
Summary of argument	9
Argument	9
I. When the unlawful agreement contemplates bringing to pass a continuous cooperation of the conspirators, the conspiracy is said to be continuing, but nevertheless single	11
II. A single agreement to commit acts in violation of several penal statutes is to be punished as one conspiracy	12
III. Multiplicity of purposes in a conspiracy does not create several conspiracies	13
IV. When only one conspiracy is shown, if it be shown, then a sentence of not more than two years imprisonment and a fine can be imposed	13
Conclusion	14

TABLE OF CASES CITED.

	Page
Albrecht v. *United States*, 273 U.S. 1, 71 L. Ed. 505, 47 S. Ct. 250	13
Blockburger v. *United States*, 284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180	13
Brown v. *Elliott*, 225 U.S. 392, 56 L. Ed. 1136, 32 S. Ct. 812	12
Brown v. *State*, 130 Fla. 479, 178 So. 153	13
Ex Parte Rose (DC), 33 F. Supp. 941	13
Fleisher v. *United States* (CCA 6th), 91 F. (2d) 404	12
Frohwerk v. *United States*, 249 U.S. 204, 63 L. Ed. 561, 39 S. Ct. 249	13
Harry Braverman v. *United States*, 317 U.S. 49, 87 L. Ed. 23	12, 14
Meyer v. *United States* (CCA 6th), 94 F. (2d) 422	12
Miller v. *United States* (CCA 7th), 4 F. (2d) 598	13
Murphy v. *United States* (CCA 7th), 285 F. (2d) 801	13
Powe v. *United States* (CCA 5th), 11 F. (2d) 598	13
Short v. *United States* (CCA 4th), 91 F. (2d) 614	13
State v. *Profita*, 114 N.J.L. 334, 176 A. 683	13
United States v. *Anderson* (CCA 7th), 101 F. (2d) 325	13
United States v. *Manton* (CCA 2nd), 107 F. (2d) 834	13
United States v. *Kissell*, 218 U.S. 601, 54 L. Ed. 1168, 31 S. Ct. 124	12

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

NO. .....

W. DANIEL PINKERTON AND
WALTER G. PINKERTON,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

W. Daniel Pinkerton and Walter G. Pinkerton, respectfully petition for a writ of certiorari to review a final decision of the Circuit Court of Appeals for the Fifth Circuit, rendered October 30, 1945 (R. p. 249) (not reported). A motion for rehearing was duly filed and was denied on December 1, 1945. This decision affirmed a judgment that was entered on May 2, 1945, by the District Court for the Southern Division of the Northern District of Alabama (not reported).

Questions Presented.

This Petition involves the following questions:

First: Whether, when certain counts of an indictment, some of which were barred by the Statute of Limitations, are held good on demurrer, the judgment partially based on these counts is good.

Second: Whether a jury's verdict of guilty on all the counts submitted to them by the court, and the counts charging substantive offenses do not affirmatively charge a conspiracy, the jury could convict if the facts in evidence show such a conspiracy to exist.

Third: Whether, when the opinion of the Circuit Court of Appeals so states that a jury could convict on all substantive counts of an indictment when there is no affirmative charge of a conspiracy, if this then makes the counts a conspiracy charge.

Fourth: Whether a conviction upon the several counts of an indictment, each, except the last count, charging substantive offenses and the last charging conspiracy to violate a different provision of the Internal Revenue Laws, and where the jury's verdict is supported by evidence of but a single conspiracy, will sustain a sentence of more than two years imprisonment, the maximum penalty for a single violation of the conspiracy statute.

Summary Statement of Matter Involved.

Walter and Dan Pinkerton, petitioners in this case, were convicted in the District Court of the United States for the Southern Division of the Northern District of Alabama on a conspiracy count containing ten separate overt acts speci-

fications in furtherance of the conspiracy. An appeal was taken to the Circuit Court of Appeals for the Fifth Circuit, Case Number 11,006, and the judgment of the lower court was reversed. After this reversal and while the case was pending, the grand jury on the 17th day of April, 1945, indicted Walter and Dan Pinkerton with other named defendants, who are not parties to this appeal, on ten substantive counts and one conspiracy count for violation of the Internal Revenue Laws of the United States of America (R. p. 2). Demurrer was filed by both petitioners to the indictment, which demurrer was overruled by the trial judge (R. p. 13 and p. 25). A plea in abatement was filed by Dan Pinkerton as to Counts 1, 2 and 4 of the indictment, and was sustained (R. p. 16 and p. 26). A plea in abatement by both petitioners to Count 11 of the indictment was overruled (R. p. 18 and p. 26). The trial court submitted the case to the jury on all counts of the indictment as to Walter Pinkerton, and on Counts 3, 5, 6, 7, 8, 9, 10 and 11 as to Dan Pinkerton.

A jury verdict of guilty on all counts of the indictment, except Count 7, was returned against Walter Pinkerton and against Dan Pinkerton on Counts 3, 5, 6, 8, 9, 10 and 11. Each defendant was given a prison sentence and fined, and both took an appeal to the Circuit Court of Appeals for the Fifth Circuit.

The appellee in that case, the United States of America, filed a motion to dismiss appeallants' appeal in the Circuit Court of Appeals on the ground that the notice of the taking of the appeal was filed too late. The court made no decision on this motion to dismiss the appeal, basing this action on the fact that the United States of America obtained the same result as sought by the motion to dismiss the appeal because the case was affirmed (R. p. 244).

Count 1 of the indictment charges Walter Pinkerton and Dan Pinkerton with the possession of eight pints of unstamped whiskey. Count 2 of the indictment charged the defendants with the possession of eight pints of whiskey with intent to defraud the United States of the tax thereon. Count 3 of the indictment charged the defendants with concealing whiskey with intent to defraud the Government of the tax thereon. Count 4 of the indictment charged the defendants with concealing, depositing or removing three pints of whiskey with intent to defraud the Government of the tax thereon. Count 5 of the indictment charged that the defendants did remove, deposit or conceal two gallons of whiskey with the intent to defraud the Government of the tax thereon. Count 6 charged the defendants with concealing a gallon of whiskey with intent to defraud the Government of the tax thereon. Count 8 of the indictment charged the defendants with removing, depositing or concealing certain goods and commodities, namely: a large quantity, to-wit, nineteen gallons of distilled spirits, commonly called whiskey, with the intent to defraud the Government of the tax thereon. Count 9 of the indictment charged the defendants with concealing one pint of whiskey with intent to defraud the Government of the tax thereon. Count 10 of the indictment charged the defendants with the unlawful possession of three and three-fourths gallons of whiskey without the container having stamps affixed thereto. Count 11 of the indictment charged the defendants with a conspiracy with others to combine, conspire, confederate and agree together to commit the acts made offenses and crimes against the United States by Sections 2810, 2833, 2834, 3321, 2803 and 3253, of the Internal Revenue Code of the United States. Sixteen overt acts were set out as having been done by one or more conspirators pursuant to said conspiracy and to effect the object of the conspiracy.

some of the overt acts in the conspiracy count are the same acts set out in the counts charging substantive offenses.

The trial court sentenced W. Daniel Pinkerton, alias Dan Pinkerton, to be committed to the custody of the Attorney General or his representative for a period of thirty months, and fined one thousand dollars ($1,000.00), to stand committed under Counts 3, 5, 6, 8, 9 and 10; and further committed W. Daniel Pinkerton, alias Dan Pinkerton, to the custody of the Attorney General or his authorized representative for the period of two years, and fined five hundred dollars ($500.00), to stand committed under Count 11 of the indictment, said sentence of two years imposed under Count 11 of the indictment to run concurrently with sentence of thirty months imposed under Counts 3, 5, 6, 8, 9 and 10 of the indictment, and that said W. Daniel Pinkerton be further imprisoned until payment of said fines or until said W. Daniel Pinkerton is otherwise discharged as provided by law.

The trial court sentenced Walter G. Pinkerton, alias Walter Pinkerton, to be committed to the custody of the Attorney General or his authorized representative for a period of thirty months and fined five hundred dollars ($500.00), to stand committed under Counts 1, 2, 3, 4, 5, 6, 8, 9, and 10 of the indictment, and to be committed to the custody of the Attorney General or his authorized representative for the period of two years under Count 11 of the indictment, the sentence of two years imposed under Count 11 to run concurrently with the sentence of thirty months imposed under Counts 1, 2, 3, 4, 5, 6, 8, 9 and 10 of the indictment, and the said Walter Pinkerton to be further imprisoned until payment of said fine or until said Walter Pinkerton is otherwsie discharged as provided by law.

An appeal was taken to the Circuit Court of Appeals for the Fifth Circuit on May 2, 1945. On October 30, 1945, the Circuit Court of Appeals rendered an opinion sustaining the judgment of the lower court. (not reported) (R. p. 243). A petition for rehearing was entered on behalf of Daniel Pinkerton and Walter Pinkerton, which said petition for rehearing was denied on December 1, 1945. (not reported) (R. p. 251).

Reasons Why a Writ of Certiorari Should Issue.

1. The Circuit Court of Appeals for the Fifth Circuit has decided an important question in a way that is in conflict with the decisions of this court and of other Circuit Courts of Appeal in that it has in effect held that if a jury finds that conspiracy exists between two or more defendants it might find the defendants guilty of as many offenses as it had illegal objects, and that for each of these offenses greater penalty than the two-year statutory penalty could be imposed.

2. The Circuit Court of Appeals for the Fifth Circuit has decided an important question in a way that is in conflict with the decisions of the Supreme Court of the United States in that it has in effect given approval of the conviction of two defendants on different counts of an indictment which conviction is contrary to the evidence, and in sustaining the conviction based it on the grounds of conspiracy. The penalty imposed is greater than the statutory penalty permitted for the offense of conspiracy against the United States, thereby being in conflict with the decisions of this Court.

3. The Circuit Court of Appeals for the Fifth Circuit has so far departed from judicial rulings of this court, which

in effect provide that a criminal conspiracy is not the commission of the crime which it contemplates, and neither violates nor arises under the statute whose violation is its object, as to call for an exercise of the power of supervision of this court.

Prayer.

For the foregoing reasons, further developed in the accompanying brief, your petitioners respectfully pray that a writ of certiorari issue out of this Honorable Court, directed to the Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Honorable Court on a day to be determined, a full and complete transcript of the record of all proceedings of such Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Honorable Court; that the final order and decree of the Circuit Court of Appeals of the Fifth Circuit may be reversed; and that your petitioners be granted such other and further relief in the premises as to this Honorable Court may be deemed just and proper.

Birmingham, Alabama. December 27, 1945.

W. DANIEL PINKERTON and
WALTER G. PINKERTON,
Petitioners,

By HARVEY DERAMUS
Birmingham 3, Alabama
JOHN S. TUCKER, JR.
Birmingham 3, Alabama
R. L. NEWTON
Jasper, Alabama
THOMAS E. SKINNER
Birmingham 3, Alabama
Attorneys for Petitioners.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Fifth Circuit was rendered on October 30, 1945, and is not reported. (R. p. 243). This opinion affirmed the judgment of the United States District Court for the Southern Division of the Northern District of Alabama. A petition for rehearing was duly filed by petitioners and was denied by the Circuit Court of Appeals for the Fifth Circuit on the 1st day of December, 1945 (R. p. 251).

Jurisdiction.

The decree of the Circuit Court of Appeals for the Fifth Circuit was entered October 30, 1945, (not reported), and petition for rehearing was denied on December 1, 1945. (not reported). The jurisdiction of this court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925; 43 Stat. 938 (28 U.S.C.A. Section 347).

Statement of the Case.

A summary of the facts is given in the petition, pages 2 to 6 inclusive.

Specification of Errors to be Urged.

All errors assigned in petitioners' appeal to the Circuit Court of Appeals for the Fifth Circuit and all errors assigned in petitioners' application for a rehearing filed in the Circuit Court of Appeals for the Fifth Circuit are intended to be urged here, also all errors believed to be found in the conclusions and opinion contained in the decision of the

Circuit Court of Appeals for the Fifth Circuit of which review is sought.

Summary of Argument.

I. When the unlawful agreement contemplates bringing to pass a continuous cooperation of the conspirators, the conspiracy is said to be continuing, but nevertheless single.

II. A single agreement to commit acts in violation of several penal statutes is to be punished as one conspiracy.

III. Multiplicity of purposes in a conspiracy does not create several conspiracies.

IV. When only one conspiracy is shown, if it be shown, then a sentence of not more than two years imprisonment and a fine can be imposed.

Argument.

We do not waive any argument, assignment of errors, etc., presented in the lower courts, and we attempt here to make this argument as brief and concise as possible.

On appeal to the Circuit Court of Appeals for the Fifth Circuit, the court sustained the judgment of the lower court. Mr. Justice Kennamer wrote the opinion, and among other things, stated that Counts 1 and 10 were barred by the Statute of Limitations and should not have gone to the jury, but this was error without injury. (*Pinkerton, et al* v. *United States* (not reported). (R. p. 243).

As to the petitioner, W. Daniel Pinkerton, this would leave Counts 3, 5, 6, 8, 9 and 11 standing against him, and

Counts 2, 3, 4, 5, 6, 8, 9 and 11 as against the petitioner, Walter G. Pinkerton.

The evidence fully shows that as to the petitioners, in so far as the substantive counts are concerned, they were not guilty of the charges, and under no rules of evidence would this be true. There is only one theory on which the Circuit Court of Appeals could affirm the judgment of the lower court, and that is the theory it used. Mr. Justice Kennamer in his opinion in *Pinkerton, et al* v. *United States* (not reported), (R. p. 243), stated, among other things:

> "In deciding the guilt or innocence of the defendants on the several counts charging substantive offenses the jury could weigh all the foregoing circumstances in determining whether these two appellants were in fact in a conspiracy in the acts that constitute the violations in the manner and form set out in the counts charging substantive offenses, and this would be true if there had been no conspiracy count in the indictment."

Mr. Justice Kennamer further states, and he quotes:

> "'Although conspiracy be not charged, if it be shown to exist, the act of one or more defendants in furtherance of the common plan is in law the act of all.' *Davis* v. *United States*, 12 Fed. (2nd) 253."

From this we can readily see that the Circuit Court of Appeals upheld the conviction on Counts 3, 5, 6, 8, 9, 10 and 11 as to W. Daniel Pinkerton and on Counts 1, 2, 3, 4, 5, that the evidence showed a conspiracy existed, and, therefore, the act of one petitioner was the act of the other. Thus we see that all the counts that went to the jury were based on the theory that a conspiracy existed, and this is further

6, 8, 9, 10 and 11 as to Walter G. Pinkerton, on the theory

evidenced by a statement in the lower court's charge to the jury:

> "In connection with those counts, those substantive things (meaning the first ten counts as to the petitioner, Walter G. Pinkerton, and the first ten counts except Nos. 1, 2, and 4 as to the petitioner, W. Daniel Pinkerton) after you gentlemen have considered all the evidence in this case, if you are satisfied from the evidence beyond a reasonable doubt that at the time the particular substantive offenses were committed, that is the offenses charged in the first ten counts of this indictment, if you are satisfied from the evidence beyond a reasonable doubt that the two defendants were in an unlawful conspiracy, as I have heretofore defined unlawful conspiracy, then you would have a right, if you found that to be true to your satisfaction beyond a reasonable doubt, to convict these defendants on all these substantive counts, provided the acts referred to in the substantive counts were acts in furtherance of the unlawful conspiracy, which you have found from the evidence existed." (R. pp. 191-192).

The trial court seems to have had in mind also that a conspiracy need not be affirmatively alleged but only shown to exist by the facts in evidence.

With this in mind, we now are faced with the fact that each of the eleven counts become separate counts, each charging a conspiracy to violate a separate and distinct internal revenue law of the United States. By the construction of the indictment and as reflected in the charge to the jury there seems to be only the question of a single agreement to commit acts in violation of several penal statutes. When the unlawful agreement contemplates bringing pass a continuous result requiring continuous cooperation of the conspirators, the conspiracy is said to be continuing, but nevertheless single *United States* v. *Kissel*, 218 U.S.

601, 54 L. Ed. 1168, 31 S. Ct. 124; *Brown* v. *Elliott*, 225 U.S. 392, 56 L. Ed. 1136, 32 S. Ct. 812.

The question then to be decided is whether a single agreement to commit acts in violation of several penal statutes is to be punished as one or several conspiracies.

The earlier decisions of the Circuit Court of Appeals for the Sixth Circuit seem to follow the theory that each count of an indictment charging as distinct offenses the several illegal objects of one continuing conspiracy, that it might find the defendants guilty of the many offenses as it had illegal objects, and that for each such offense the two-year statuory penalty could be imposed. *Fleisher* v. *United States* (CCA, 6th), 91 F. (2nd) 404; *Meyer* v. *United States* (CCA, 6th), 94 F. (2nd) 433. The Circuit Court of Appeals for the Fifth Circuit seems to follow the same theory on the basis of its ruling in the case at bar.

The Supreme Court of the United States has a different ruling as set out in the case of *Harry Braverman* v. *United States of America*, 317 U.S. 49, 87 L. Ed. 23. This case holds, among other things, that a conviction upon the several counts of an indictment each charging conspiracy to violate a number of different provisions of the Internal Revenue Laws, where the jury's verdict is supported by evidence of but a single conspiracy, will not sustain a sentence of more than the maximum penalty for a single violation of the conspiracy statute. The court states also in effect, that a criminal conspiracy is not the commission of the crime which it contemplates, and neither violates nor arises under the statute whose violation is its object.

We do not find in the record of the case at bar any claim by respondent that there were separate agreements for such

purposes, separately reached or arrived at, and unless it is so claimed, the conspiracy is still single and not several, however multifarious the purpose. *State* v. *Profita*, 114 N.J.L. 334, 176 A. 683; *Brown* v. *State*, 130 Fla. 479, 178 So. 153.

Multiplicity of purposes in a conspiracy does not create several conspiracies. *Frohwerk* v. *United States*, 249 U.S. 204, 63 L. Ed. 561, 39 S. Ct. 249; *United States* v. *Manton* (CCA 2nd), 107 F. (2nd) 834; *Short* v. *United States* (CCA 4th), 91 F. (2nd) 614; *Powe* v. *United States* (CCA 5th), 11 F. (2nd) 598; *Miller* v. *United States* (CCA 7th), 4 F. (2nd) 228, Writ of Certiorari denied in 268 U.S. 692, 69 L. Ed. 1160, 45 S. Ct. 511; *Murphy* v. *United States* (CCA 7th), 285 F. 801; *United States* v. *Anderson* (CCA 7th) 101 F. (2nd) 325; *Blockburger* v. *United States*, 284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180; *Albrecht* v. *United States*, 273 U.S. 1, 71 L. Ed. 505, 47 S. Ct. 250 (distinguished).

When only one conspiracy is shown then a sentence of not more than two years imprisonment and a fine can be imposed. *Frohwerk* v. *United States*, supra; *United States* v. *Manton*, supra; *Powe* v. *United States*, supra; *Miller* v. *United States*, supra; *Murphy* v. *United States*, supra; *United States* v. *Anderson*, supra; Ex Parte Rose (DC) 33 F. Supp. 941.

Under the decision, as rendered by the Circuit Court of Appeals for the Fifth Circuit, in the case at bar the defendants were given a greater sentence than that set out as the maximum in Title 18, Sec. 88 USCA.

We reiterate: that the Circuit Court of Appeals for the Fifth Circuit seems to base its affirmance of the result reached by the trial court on the theory that each petitioner was convicted of the substantive charges because the evidence showed that a conspiracy existed, and, therefore, the act of one petitioner or one defendant was the act of the other. Therefore, we must conclude that the petitioners were in effect charged with a conspiracy in each count of this indictment. If this be true, under the authority of *Braverman* v. *United States*, supra, the petitioners were only guilty, if the evidence shows it, of one conspiracy, and the punishment of imprisonment for thirty months is excessive and not allowed by law.

WHEREFORE, it is submitted that this petition for certiorari to review the decision of the Circuit Court of Appeals for the Fifth Circuit should be granted.

HARVEY DERAMUS,
Birmingham, Alabama

JOHN S. TUCKER, JR.,
Birmingham, Alabama

THOMAS E. SKINNER,
Birmingham, Alabama

R. L. NEWTON,
Jasper, Alabama
Counsel for Petitioners.

FILE COPY

Office - Supreme Court, U. S.
FILED
APR 8 1946
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1945

No. 719

W. DANIEL PINKERTON AND
WALTER G. PINKERTON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONERS

HARVEY DERAMUS,
JOHN S. TUCKER, JR.,
THOMAS E. SKINNER,
Birmingham 3, Alabama.
REUBEN L. NEWTON,
Jasper, Alabama,
Counsel for Petitioners.

INDEX

TABLE OF CONTENTS

	Page
Brief for the Petitioners	1
The Opinion of the Court Below	1
Statement as to Jurisdiction	2
Statement of the Case	2
Specification of Errors	7
Summary of Argument	8
Statutes Involved	9
Argument	12
I. A person may not be convicted of an alleged substantive offense, when he is not the principal actor in the offense, nor participated therein, merely because it might be shown that he was a member of a conspiracy to commit these acts.	
II. When a conspiracy is shown to exist, if it does exist, then the separate substantive offenses become in effect separate counts charging conspiracy.	
III. One group of defendants cannot be subjected to a severe penalty while another group of defendants are subjected to a relatively light penalty merely on the whim of the pleader (grand jury).	
IV. When the unlawful agreement contemplates bringing to pass a continuous cooperation of the conspirators, the conspiracy as said to be continuing but nevertheless single.	
V. A single agreement to commit acts in violation of several penal statutes is to be punished as one conspiracy.	
VI. Multiplicity of purposes in a conspiracy does not create several conspiracies.	
VII. Conspiracy and the substantive offenses are merged into one offense upon the commission of the substantive offense or offenses.	
IX. It is necessary to prove that a defendant aided or abetted in the commission of an offense before he can be convicted of that offense, and it is not enough that he is merely shown to be a member of a criminal conspiracy.	
Conclusion	23

INDEX

Table of Cases Cited

	Page
Albrecht v. United States, 273 U. S. 1, 71 L. Ed. 505, 47 S. Ct. 250	18
Blockburger v. United States, 284 U. S. 299, 76 L. Ed. 306, 52 S. Ct. 180	18
Brown v. Elliott, 225 U. S. 392, 56 L. Ed. 1136, 32 S. Ct. 812	15
Brown v. State, 130 Fla. 479, 178 So. 153	18
Ex Parte Rose (DC), 33 F. Supp. 941	19
Fleisher v. United States (CCA 6th), 91 F. (2d) 404	17
Frohwerk v. United States, 249 U. S. 204, 63 L. Ed. 561, 39 S. Ct. 249	18, 19
Harry Braverman v. United States, 317 U. S. 49, 87 L. Ed. 23	17, 23
Laughter v. United States, 259 Fed. 94 (CCA 6th)	21
Meyer v. United States (CCA 6th), 94 F. (2d) 422	17
Miller v. United States (CCA 7th), 4 F. (2d) 598	18, 19
Murphy v. United States (CCA 7th), 285 F. (2d) 801	18, 19
Powe v. United States (CCA 5th), 11F. (2d) 598	18,19
Short v. United States (CCA 4th), 91 F. (2d) 614	18
State v. Profita, 114 N. J. L. 334, 176 A. 683	18
United States v. Anderson (CCA 7th), 101 F. (2)d 325	18, 19
United States v. Manton (CCA 2nd), 107 F. (2d) 834	18, 19
United States v. Kissell, 218 U. S. 601, 54 L. Ed. 1168, 31 S. Ct.	15
United States v. Sall, 116 F. (2d) 745, 747, 748 (CCA 3rd)	19, 20, 21
Weiss v. United States, 103 F. (2) 759, (CCA 3rd)	19

INDEX

STATUTES CITED

	Page
INTERNAL REVENUE CODE	
Section 2803 (26 USCA 2803)	5, 9, 18
Section 2810 (26 USCA 2810)	5, 10, 18
Section 2833 (26 USCA 2833)	5, 10, 18
Section 2834 (26 USCA 2834)	5, 10, 18
Section 3253 (26 USCA 3253)	5, 11, 17
Section 3321 (26 USCA 3321)	5, 11, 18
Section 3748 (26 USCA 3748)	11
CRIMINAL CODE	
Section 37 (18 USCA 88)	12, 16, 17, 19
Section 332 (18 USCA 550)	12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 719

W. DANIEL PINKERTON AND
WALTER G. PINKERTON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONERS

THE OPINION OF THE COURT BELOW

The opinion of the Circuit Court of Appeals for the Fifth Circuit was rendered on October 30, 1945, and is ~~not~~ 151 F 2d 479 reported (R. 242-245). This opinion affirmed the judgment of the United States District Court for the Southern Division of the Northern District of Alabama. A petition

for rehearing was duly filed by petitioners and was denied by the Circuit Court of Appeals for the Fifth Circuit on December 1, 1945 (R. 248).

STATEMENT AS TO JURISDICTION

The decree of the Circuit Court of Appeals for the Fifth Circuit was entered October 30, 1945 (not reported), (R. 242-245), and a petition for rehearing was denied on December 1, 1945 (not reported), (R. 248). The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925; 43 Stat. 938 (28 USCA 347). A petition for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit was filed January 4, 1946, and an order allowing Certiorari was filed March 4, 1946 (R. 248).

STATEMENT OF THE CASE

W. Daniel Pinkerton and Walter G. Pinkerton, petitioners, were convicted in the District Court of the United States for the Southern Division of the Northern District of Alabama on a conspiracy count containing ten separate overt acts specifications in furtherance of the conspiracy. An appeal was taken to the Circuit Court of Appeals for the Fifth Circuit, Case Number 11,006, and judgment of the lower court was reversed. After this reversal and while the case was pending, the grand jury, on April 17, 1945, indicted W. Daniel Pinkerton and Walter G. Pinkerton, with other named defendants, who are not parties to this action, on ten substantive counts and one conspiracy count for violation of the Internal Revenue Laws of the United States of America (R. 2-13). Demurrer was filed by both petitioners to the indictment, which demurrer

was overruled by the trial judge (R. 13 and 25.) A plea in abatement was filed by W. Daniel Pinkerton as to Counts 1, 2, and 4 of the indictment (R. 16, 17), and was sustained (R. 26). A plea in abatement by both petitioners to Count 11 was entered (R. 18) and this plea was overruled (R. 26). The trial Court submitted the case to the jury on all counts of the indictment as to Walter G. Pinkerton, and on Counts 3, 5, 6, 7, 8, 9, 10 and 11 as to W. Daniel Pinkerton.

A jury verdict of guilty on all Counts of the indictment, except Count 7, was returned against Walter G. Pinkerton and against W. Daniel Pinkerton on Counts 3, 5, 6, 8, 9, 10 and 11 (R. 32).

Each of the defendants was given a prison sentence and fine (R. 32-35), and both appealed to the Circuit Court of Appeals for the Fifth Circuit.

The appellee in that case, the United States of America, filed a motion to dismiss appellants' appeal in the Circuit Court of Appeals on the ground that notice of the taking of the appeal was filed too late. The Court made no decision on this motion to dismiss the appeal, basing this action on the fact that the United States of America obtained the same result as sought by the motion to dismiss the appeal because the case was affirmed (R. 243).

Count 1 of the indictment charges Walter Pinkerton and Daniel Pinkerton with the possession of eight pints of unstamped whiskey (R. 2).

Count 2 of the indictment charges the defendants with the possession of eight pints of whiskey with intent to defraud the United States of the tax thereon (R. 3).

Count 3 of the indictment charges the defendants with concealing whiskey with intent to defraud the Government of the tax thereon (R. 3).

Count 4 of the indictment charges the defendants with concealing, depositing or removing three pints of whiskey with intent to defraud the Government of the tax thereon (R. 4).

Count 5 of the indictment charges that the defendants did remove, deposit or conceal two gallons of whiskey with the intent to defraud the Government of the tax thereon (R. 4, 5).

Count 6 charges the defendants with concealing a gallon of whiskey with intent to defraud the Government of the tax thereon (R. 5).

Count 7 (R. 5) is omitted because the jury found the petitioners not guilty of this charge.

Count 8 of the indictment charges the defendants with removing, depositing or concealing certain goods and commodities, namely: a large quantity, to-wit, nineteen gallons of distilled spirits, commonly called whiskey, with the intent to defraud the Government of the tax thereon (R. 6).

Count 9 of the indictment charges the defendants with concealing one pint of whiskey with intent to defraud the Government of the tax thereon (R. 7).

Count 10 of the indictment charges the defendants with the unlawful possession of three and three-fourths gallons of whiskey without the container having stamps affixed thereto (R. 7).

Count 11 of the indictment charges the defendants with a conspiracy with others to combine, conspire, confederate and agree together to commit the acts made offenses and crimes against the United States by Sections 2810, 2833, 2834, 3321, 2803 and 3253, of the Internal Revenue Code of the United States. Sixteen overt acts were set out as having been done by one or more conspirators pursuant to said conspiracy and to effect the object of the conspiracy (R. 8-13). Some of the overt acts in the conspiracy count are the same acts set out in the counts charging substantive offenses.

The overt act number 2 (R. 10) is the same as the offense charged in Count 1 of the indictment (R. 2). Plea in abatement sustained as to this count by the trial court (R. 16 and 26).

The overt act set out as number 3 (R. 11) is explained by the fact that Daniel Pinkerton possessed Retail Liquor Dealers Licenses for the years 1933 to 1944, inclusive (R. 158).

The overt act number 6 (R. 11) is the same as the offense charged in Count 4 of the indictment (R. 4). Plea in abatement sustained as to this Count by the trial court (R. 17 and 26).

The overt act number 8 (R. 11) was the offense for which Daniel Pinkerton had been previously convicted and had served his sentence therefor (R. 159-160).

The trial court sentenced W. Daniel Pinkerton, alias Dan Pinkerton, to be committed to the custody of the Attorney General or his authorized representative for a period

of thirty months, and fined one thousand dollars ($1,000.00), to stand committed under Counts 3, 5, 6, 8, 9 and 10; and further committed W. Daniel Pinkerton, alias Dan Pinkerton, to the custody of the Attorney General or his authorized representative for the period of two years, and fined five hundred dollars ($500.00), to stand committed under Count 11 of the indictment, said sentence of two years imposed under Count 11 of the indictment to run concurrently with sentence of thirty months imposed under Counts 3, 5, 6, 8, 9 and 10 of the indictment, and that said W. Daniel Pinkerton be further imprisoned until payment of said fines or until said W. Daniel Pinkerton is otherwise discharged as provided by law (R. 35-37).

The trial court sentenced Walter G. Pinkerton, alias Walter Pinkerton, to be committed to the custody of the Attorney General or his authorized representative for a period of thirty months and fined five hundred dollars ($500.00), to stand committed under Counts 1, 2, 3, 4, 5, 6, 8, 9 and 10 of the indictment, and to be committed to the custody of the Attorney General or his authorized representative for the period of two years under Count 11 of the indictment, the sentence of two years imposed under Count 11 to run concurrently with the sentence of thirty months imposed under Counts 1, 2, 3, 4, 5, 6, 8, 9 and 10 of the indictment, and the said Walter Pinkerton to be further imprisoned until payment of said fine or until said Walter Pinkerton is otherwise discharged as provided by law (R. 32-35).

An appeal was taken to the Circuit Court of Appeals for the Fifth Circuit on May 2, 1945. On October 30, 1945, the Circuit Court of Appeals rendered an opinion sustaining the judgment of the lower court (not reported) (R. 243). A petition for rehearing was entered on be-

half of Daniel Pinkerton and Walter Pinkerton, which said petition for rehearing was denied on December 1, 1945 (not reported) (R. 251).

SPECIFICATION OF ERRORS

We desire to urge all errors assigned on the appeal to the Circuit Court of Appeals (R. 213-239). And further we contend that the Circuit Court of Appeals for the Fifth Circuit erred in the following respects:

1. In holding that if a jury finds that a conspiracy exists between two or more persons, defendants, it might find the defendants guilty of as many offenses as it had illegal objects, these objects being charged also as substantive offenses, and that for each of these offenses a greater penalty than the two year statutory penalty could be imposed.

2. In holding that a person may be convicted of an offense when the evidence is contrary thereto.

3. In holding in effect that a criminal conspiracy is the commission of the crime which it contemplates and violates and arises under the statute whose violation is its object.

4. In holding that a person may be convicted of an offense as a principal actor, on the theory of agency and not on the theory of his being an aider or abettor thereto.

5. In holding in effect that the theory of the pleader (grand jury) can determine whether or not a person charged with criminal offenses, and if convicted, will secure a greater or lesser penalty according to the manner in which the indictment is drawn.

6. In holding that the crimes involving substantive offenses are not merged into or with the criminal conspiracy when there is a complete identity between those acts which are essential to make the conspiracy punishable and those acts which are necessary to make out the substantive offenses.

7. In holding in effect that even though a conspiracy be not charged, if it be shown to exist, the act of one or more defendants in furtherance of the common plan is in law the act of all, and applying this theory to hold true as to substantive offenses.

SUMMARY OF ARGUMENT

I. A person may not be convicted of an alleged substantive offense, when he was not the principal actor in the offense, nor participated therein, merely because it might be shown that he was a member of a conspiracy to commit these acts.

II. When a conspiracy is shown to exist, if it does exist, then the separate substantive offenses, become in effect separate counts charging a conspiracy.

III. One group of defendants cannot be subjected to a severe penalty while another group of defendants are subjected to a relatively light penalty merely on the whim of the pleader (grand jury).

IV. When the unlawful agreement contemplates bringing to pass a continuous cooperation of the conspirators, the conspiracy is said to be continuing but nevertheless single.

V. A single agreement to commit acts in violation of several penal statutes is to be punished as one conspiracy.

VI. Multiplicity of purposes in a conspiracy does not create several conspiracies.

VII. When only one conspiracy is shown, if it be shown, then a sentence of not more than two years imprisonment and a fine can be imposed.

VIII. Conspiracy and the substantive offenses are merged into one offense upon the commission of the substantive offense or offenses.

IX. It is necessary to prove that a defendant aided or abetted in the commission of an offense before he can be convicted of that offense, and it is not enough that he is merely shown to be a member of a criminal conspiracy.

STATUTES INVOLVED

Section 2803 of the Internal Revenue Code (26 USCA 2803) provides in pertinent part:

> (a) No person shall . . . possess . . . any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal-revenue taxes imposed on such spirits. . . .
>
> * * * * *
>
> (g) Any person who violates any provision of this section . . . shall on conviction be punished by fine not exceeding $1,000, or by imprisonment at hard labor not exceeding five years, or by both. . . .

Section 2810 (26 USCA 2810), provides in pertinent part:

> (a) Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register the same . . .
>
> ~~Any~~ AND every person having in his custody . . . which is not so registered, shall pay a penalty of $500.00, and shall be fined not less than $100.00 nor more than $1,000.00, and imprisoned for not less than one month, nor more than two years.

Section 2833 of the Internal Revenue Code (26 USCA 2833) provides in pertinent part:

> (a) Any person who shall carry on the business of a distiller without having given bond . . ., or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax . . ., shall for every such offense, be fined not less than $100.00 nor more than $5,000.00 and imprisoned for not less than thirty days nor more than two years. . . . .

Section 2834 of the Internal Revenue Code (26 USCA 2834) provides in pertinent part:

> No mash, wort, or wash, fit for distillation or for the production of spirits or alcohol, shall be made or fermented . . . on any premises other than a distillery duly authorized according to law; and no mash . . . so made and fermented shall be sold or removed from any distillery before being distilled; and no other person . . . shall separate the alcoholic spirits from . . . and the tax paid thereon. Every person who violates . . . shall be fined . . . not less than $500.00 nor more than $5,000.00, and be imprisoned not less than six months nor more than two years.

Section 3253 of the Internal Revenue Code (26 USCA 3253) provides in pertinent part:

> Any person who shall carry on the business of a brewer, rectifier, wholesale liquor dealer, retail liquor dealer . . ., and wilfully fails to pay the special tax . . ., shall for every such offense, be fined not less than $100.00 nor more than $5,000.00, and be imprisoned for not less than thirty days nor more than two years. . . . .

Section 3321 of the Internal Revenue Code (26 USCA 3321) provides in pertinent part:

> (a) Every person who removes, deposits, or conceals, or is concerned in removing, depositing, or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine of not more than $5,000.00 or be imprisoned for not more than three years, or both.

Section 3748 of the Internal Revenue Code (26 USCA 3748) provides in pertinent part:

> (a) No person shall be prosecuted, tried or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be six years—
>
> (1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner,

(2) for the offense of wilfully attempting in any manner to evade or defeat any tax or the payment thereof, . . .

Section 37 of the Criminal Code (18 USCA 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000.00, or imprisoned not more than two years, or both.

Section 332 of the Criminal Code (18 USCA 550) provides:

> Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

ARGUMENT

We do not waive any errors assigned on appeal to the Circuit Court of Appeals; we will not argue them in this brief but will confine ourselves to what we consider to be the most outstanding errors of said court. In this we desire to be as concise as possible and the majority of the additional errors assigned in this brief raise the question of whether one of the defendants would be guilty of a substantive offense when the evidence shows without a doubt that this particular defendant was not actively participating in such and had no interest in or with the alleged commis-

sion of the particular act or acts. The additional errors that we offer, are those we feel were committed by the Circuit Court of Appeals for the Fifth Circuit.

We contend that the evidence fully shows that as to the petitioner, W. Daniel Pinkerton, especially as to the substantive counts concerned, he was not guilty of the charges, and under no rules of evidence would this be true.

Only one theory could have been relied on by the Circuit Court of Appeals for the Fifth Circuit in affirming the judgment of the District Court, and that theory seems to be that if a conspiracy be shown to exist or to have existed, then after the jury finds this to be true, the defendants may then be convicted of a substantive offense, even though the defendant had not participated therein or had no knowledge of such.

The Court, in its opinion in *Pinkerton, et al* v. *United States* (~~not reported~~ 151 F 2d 499) (R. 242, 244), stated among other things:

> "In deciding the guilt or innocence of the defendants on the several counts charging substantive offenses the jury could weigh all the foregoing circumstances in determining whether these two appellants were in fact in a conspiracy in the acts that constitute the violations in the manner and form set out in the counts charging substantive offenses, and this would be true if there had been no conspiracy count in the indictment."

The Court further states, and it quotes:

> "'Although conspiracy be not charged, if it be shown to exist, the act of one or more defendants in furtherance of the common plan is in law the act of all.' *Davis* v. *United States*, 12 F. (2nd) 253."

These statements seem in effect to say that a conspiracy need not be charged in order to convict a defendant of a crime, even though he did not participate in it, had no knowledge of it, and was not connected with it, for an act performed by one is the act of all, if it has been found from the evidence that there exists in fact a conspiracy.

From this we can readily see that the Circuit Court of Appeals upheld the conviction on Counts 3, 5, 6, 8, 9, 10 and 11 as to W. Daniel Pinkerton and on Counts 1, 2, 3, 4, 5, 6, 8, 9, 10 and 11, as to Walter G. Pinkerton on the theory that the evidence showed that a conspiracy existed, and, therefore, the act of one was the act of the other. Thus we see that all the counts that went to the jury were based on the theory that a conspiracy existed, and this is further evidenced by a statement in the District Court's charge to the jury:

> "In connection with those counts, those substantive things (meaning the first ten counts as to the petitioner, Walter G. Pinkerton, and the first ten counts except Nos. 1, 2, and 4 as to the petitioner, W. Daniel Pinkerton) after you gentlemen have considered all the evidence in this case if you are satisfied from the evidence beyond a reasonable doubt that at the time the particular substantive offenses were committed, that is, the offenses charged in the first ten counts of this indictment, if you are satisfied from the evidence beyond a reasonable doubt that the two defendants were in an unlawful conspiracy, as I have heretofore defined unlawful conspiracy to you, then you would have a right, if you found that to be true to your satisfaction beyond a reasonable doubt, to convict each of these defendants on all these substantive counts, provided the acts referred to in the substantive counts were acts in furtherance of the unlawful conspiracy, or object of the unlawful conspiracy, which you have found from the evidence existed." (R. 191-192).

The trial court seems to have had in mind also that a conspiracy need not be affirmatively alleged but only shown to exist by the facts in evidence, and seems to state that in order to convict Daniel Pinkerton of any one or more of the substantive counts, there must have been a conspiracy first found to exist.

With this in mind, we now are faced with the fact that each of the substantive counts become separate counts, each charging a conspiracy to violate a separate and distinct Internal Revenue Law of the United States. By the construction of the indictment and as reflected in the charge to the jury there seems to be only the question of a single agreement to commit acts in violation of several penal statutes. When the unlawful agreement contemplates bringing to pass a continuous result requiring continuous cooperation of the conspirators, the conspiracy is said to be continuing, but nevertheless single. *United States* v *Kissel*, 218 U.S. 601, 54 L. Ed. 1168, 31 S. Ct. 124; *Brown* v *Elliott*, 225 U.S. 392, 56 L. Ed. 1136, 32 S. Ct. 812.

What difference is there in effect, between a count alleging a conspiracy and a count alleging the commission of a substantive offense, if one person can be convicted of the substantive offense if a conspiracy be shown to exist, even though not alleged, and basing such conviction on the conspiracy?

Is it just, equitable or reasonable that the whim of the pleader could subject one group of defendants to a severe penalty, and for similar offenses subject another group of defendants to only a relatively light penalty? For instance: The two petitioners are charged in an indictment containing eleven counts, the first ten being substantive offenses and the last being a conspiracy. If the jury should

find the defendants guilty under all eleven counts, what would prevent the court from sentencing each to a term of thirty-six years in the penitentiary and a fine totaling $55,000.00? Then assume that other defendants were charged in an indictment containing eleven counts, each of which charge a separate violation of the Internal Revenue Code, identically the same as those against the principals, but each count alleging a conspiracy to violate rather than the actual violation. Then if defendants were convicted under all counts they could only be sentenced to the maximum punishment allowed for the conviction of a conspiracy under Section 37 of the Criminal Code (18 USCA 88). This of course, assuming that the conspiracy is single.

Section 37 of the Criminal Code (18 USCA 88) provides:

> If two or more persons conspire to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

The next question to be decided is whether a single agreement to commit acts in violation of several penal statutes is to be punished as one or several conspiracies.

The earlier decisions of the Circuit Court of Appeals for the Sixth Circuit seem to follow the theory that each count of an indictment charging as distinct offenses the several illegal objects of one continuing conspiracy, that it might find the defendants guilty of as many offenses as

had illegal objects, and that for each such offense the two-year statutory penalty could be imposed. *Flesher* v. *United States* (CCA 6th.) 91 F. (2nd) 414; *Mayer* v. *United States* (CCA 6th), 94 F. (2nd) 493. The Circuit Court of Appeals for the Fifth Circuit seems to follow the same theory on the basis of its ruling in the case at bar.

The Supreme Court of the United States in the case of *Braverman* v. *United States*, 317 U.S. 49, 87 L. Ed. 23*, holds among other things, that a conviction upon the several counts of an indictment each charging conspiracy to violate a number of different provisions of the Internal Revenue Laws, where the jury's verdict is supported by evidence but of a single conspiracy, will not sustain a sentence of more than the maximum penalty for a single violation of the conspiracy statute. The Court states also in effect, that a criminal conspiracy is not the commission of the crime which it contemplates, and neither violates nor arises under the statute whose violation is its object. The court further

---

*In the Braverman [illegible] the [illegible] were indicted, with others, on seven counts, each charging a conspiracy to violate a separate and distinct internal revenue law of the United States. The seven counts respectively charged them with [illegible] violations of Sec. 37 of the Criminal Code (18 USCA [illegible]) [illegible] on the business of wholesale and retail liquor dealers without [illegible] the special occupational tax stamps required by statute, 26 USCA Sec. 3253; (2) to possess distilled spirits, the immediate [illegible] did not have stamps affixed denoting the quantity of [illegible] spirits which they contained and evidencing payment of all [illegible] taxes imposed on such spirits, 26 USCA Sec. 2803; [illegible] unstamped distilled spirits, the immediate containers of which did not have affixed the required stamps, 26 USCA Sec. 2833; [illegible] the business of distillers without having given bond as required by law, 26 USCA Sec. 2833; (5) to remove, deposit and conceal [illegible] spirits in respect whereof a tax is imposed by law with intent [illegible] United States of such tax, 26 USCA 3321; (6) to possess unregistered still and distilling apparatus, 26 USCA Sec. 2810, and (7) to make [illegible] fermented mash fit for distillation, on unauthorized premises, 26 USCA Sec. 2834.

stated that on the trial there was evidence from which the jury could have found that for a considerable period of time petitioners, with others collaborated in the illicit manufacture, transportation, and distribution of distilled spirits.

We do not find in the record of the case at bar any claim by respondent that there were separate agreements for such purposes, separately reached or arrived at, and unless it is so claimed, the conspiracy is still single and not several, however multifarious the purpose. *State* v. *Profita*, 114 N.J.L. 334, 176 A. 683; *Brown* v. *State*, 130 Fla. 479, 178 So. 153.

Multiplicity of purposes in a conspiracy does not create several conspiracies. *Frohwerk* v. *United States*, 249 U.S. 204, 63 L. Ed. 561, 39 S. Ct. 204; *United States* v. *Manton* (CCA 2nd), 107 F. (2nd) 834; *Short* v. *United States* (CCA 4th), 91 F. (2nd) 614; *Pouce* v. *United States* (CCA 5th), 11 F. (2nd) 598; *Miller* v. *United States* (CCA 7th), 4 F. (2nd) 228, Writ of Certiorari denied in 268 U.S. 692, 69 L. Ed. 1160, 45 S. Ct. 511; *Murphy* v. *United States* (CCA 7th) 285 F. 801; *United States* v. *Anderson* (CCA 7th) 101 F. (2nd) 325; *Blockburger* v. *United States*, 284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180; *Albrecht* v. *United States*, 273 U.S. 1, 71, L. Ed. 505, 47 S. Ct. 250 (distinguished).

When only one conspiracy is shown then a sentence of not more than two years imprisonment and a fine can be imposed. *Frohwerk* v. *United States*, supra; *United States* v. *Manton*, supra; *Pouce* v. *United States*, supra; *Miller* v. *United States*, supra; *Murphy* v. *United States*, supra; *United States* v. *Anderson*, supra; *Ex Parte Rose* (DC) 33 F. Supp. 941.

Under the decision, as rendered by the Circuit Court of Appeals for the Fifth Circuit in the case at bar, the defendants were given a greater sentence than that set out as the maximum in Title 18, Sec. 88 USCA.

The Court in the case of *Wong v. United States*, 103 F. (2nd) 759, (CCA 3d) states:

"It is difficult to conceive of a crime committed by two or more without a conspiracy to commit it." The court continues:

"It is easy to distinguish them as two different offenses. (meaning conspiracy and substantive offense) and yet the truth is that the conspiracy is merged in the substantive crime upon its commission. Conspiracy indictments have become very common. At first the two offenses were charged in separate counts. Then was followed, as here, the practice of indicting only for the conspiracy. This often, and almost always, results in practical disadvantage to the defendants. Because of this the Supreme Court has cautioned trial courts to be solicitous to see that defendants are not prejudiced but are accorded all their legal rights—— conspiracy is a fact to be charged in an indictment and the truth of the charge proven by evidence."

The court states in *United States v. Sall*, 116 F. (2nd) 745, 747, 748 (CCA 3d):

"It was not sufficient merely to prove that he was a member of the conspiracy to manufacture illicit alcohol and that in the course of that conspiracy those particular (substantive) crimes were committed by other conspirators."

and that,

"It is still necessary to prove that the defendant, even though he had joined the conspiracy, had also

joined . . . in the concealment of alcohol which constituted the substantive offense with which he is charged."

The court further states that,

"It is the act of concealment with criminal intent, and not the previous agreement, which is the gist of that offense. To hold otherwise would be to ignore the difference in character between the crime of conspiracy and the substantive crimes which may result from it and enable the government through the use of the conspiracy dragnet to convict a conspirator of every substantive offense committed by any member of the group even though he had no part in it or even knowledge of it. To permit this would open the way for a conviction of a conspirator more than once for the same conspiracy, the substantive counts being, if the government's theory is accepted, in fact merely additional conspiracy counts each alleging one overt act. Where as here but one conspiracy has been shown a defendant may not be convicted twice of having joined it for that would be to place him twice in jeopardy for the same offense."

The court also states that one who joins a conspiracy to commit a crime may be convicted of the conspiracy even though he does not directly commit an overt act, but the rule is too broad if applied to one sought to be convicted as an aider or abettor in the commission of a substantive offense.

The Solicitor General points out, in the case at bar, that the substantive counts were neither submitted to the jury nor the conviction sustained below (Circuit Court of

Appeals) on the aider and abettor theory*, but upon the principle of liability of a conspirator for substantive offenses committed by another conspirator in carrying out the unlawful enterprise. This is exactly what the court held could not be done in the case of *United States* v. *Sall*, supra; that one conspirator may be convicted of the offense of conspiracy when any party to the conspiracy commits an overt act in furtherance of the conspiracy though the the one convicted did not actively participate in that overt act.

If this court permits Daniel Pinkerton to be convicted of substantive offenses, committed by others, in which he did not participate, then the field will be opened wide for mass convictions of persons, even though they had no connection whatsoever with the substantive offenses. The criminal laws should be strictly construed and followed. The government must prove all that it alleges in an indictment; why should this rule be relaxed when there is a conspiracy involved. It is not difficult to see how one alleged conspirator may be convicted of a conspiracy when an overt act was committed by another in furtherance of the conspiracy, but it is highly illogical to say that if a conspiracy be shown, then each member of the conspiracy is guilty of any substantive offense committed, especially when there is a complete identity between those acts which are essential to make the conspiracy punishable and those acts which are necessary to make out the substantive offense. *Laughter* v. *United States*, 295 F. 94 (CCA 6th).

---

*Section 332 of the Criminal Code (18 USCA 550) provides: Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	3
Statement	4
Discussion	11

CITATIONS

Cases:

Baker v. *United States*, 115 F. 2d 533, certiorari denied, 312 U. S. 692 — 13

Blue v. *United States*, 138 F. 2d 351, certiorari denied, 322 U. S. 736 — 13

Braverman v. *United States*, 317 U. S. 49 — 2, 12, 13

Cardinal v. *United States*, 50 F. 2d 166 — 15

Hirabayashi v. *United States*, 320 U. S. 81 — 15

Johnson v. *United States*, 62 F. 2d 32 — 13

Kann v. *United States*, 140 F. 2d 380, reversed on other grounds, 323 U. S. 88 — 13

Melling v. *United States*, 25 F. 2d 92 — 14

O'Brien v. *United States*, 25 F. 2d 90 — 14

Tincher v. *United States*, 11 F. 2d 18, certiorari denied, 271 U. S. 664 — 13

United States v. *Rabinowich*, 238 U. S. 78 — 13

United States v. *Sall*, 116 F. 2d 745 — 14

Statutes:

Internal Revenue Code:

Section 2803 (26 U. S. C. 2803) — 3

Section 3321 (26 U. S. C. 3321) — 3

Section 3748 (26 U. S. C. 3748) — 10

Criminal Code:

Section 37 (18 U. S. C. 88) — 3

Section 332 (18 U. S. C. 550) — 4, 14

683580—46——1

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 719

W. DANIEL PINKERTON AND WALTER G. PINKERTON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the circuit court of appeals (R. 242–245) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered October 30, 1945 (R. 246), and a petition for rehearing was denied December 1, 1945 (R. 248). The petition for a writ of certiorari was filed January 5, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of

the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Petitioners presented sixty-eight separate assignments of error (R. 218–235) in the circuit court of appeals, and the petition states that none of these is waived in this Court (Pet. 9). However, only one point is argued in the brief in support of the petition. This may be stated as follows:

The two petitioners were jointly indicted in ten counts charging substantive violations of provisions of the Internal Revenue Code relating to liquor and in one additional count charging conspiracy to violate those and other related provisions of the Code. The evidence showed that there was but one conspiracy and that the substantive offenses were committed in furtherance of that conspiracy. The trial court instructed the jury that each petitioner could be convicted of the substantive offenses if he was a party to the conspiracy at the time the offenses were committed. Did this render all eleven counts of the indictment in effect conspiracy counts charging various aims of a single conspiracy, thus making it illegal under *Braverman* v. *United States*, 317 U. S. 49, to sentence petitioners in excess of two years?

STATUTES INVOLVED

Section 2803 of the Internal Revenue Code (26 U. S. C. 2803) provides in pertinent part:

> (a) No person shall * * * possess * * * any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal-revenue taxes imposed on such spirits. * * *
>
> * * * * * *
>
> (g) Any person who violates any provision of this section * * * shall on conviction be punished by a fine not exceeding $1,000, or by imprisonment at hard labor not exceeding five years, or by both. * * *

Section 3321 of the Internal Revenue Code (26 U. S. C. 3321) provides in pertinent part:

> (a) Every person who removes, deposits, or conceals, or is concerned in removing, depositing, or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine of not more than $5,000 or be imprisoned for not more than 3 years, or both.

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one

> or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than 2 years, or both.

Section 332 of the Criminal Code (18 U. S. C. 550) provides:

> Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

STATEMENT

On April 17, 1945, the two petitioners, W. Daniel Pinkerton and Walter Pinkerton, were indicted in the District Court for the Northern District of Alabama in eleven counts charging violations of the Internal Revenue Code and conspiracy to violate certain provisions of the Code. Counts 1 and 10 (R. 2, 7–8) charged petitioners with unlawful possession of whiskey in unstamped containers on October 7, 1939, and May 29, 1940, respectively (26 U. S. C. 2803). Counts 2 to 9, inclusive (R. 3–7), charged that on various dates between October 7, 1939, and June 26, 1943, they had unlawfully removed, deposited, and concealed certain quantities of whiskey with intent to defraud the United States of the tax thereon (26 U. S. C. 3321). Count 11 (R. 8–13) charged petitioners with conspiring to violate Sections 2803, 2810, 2833, 2834, 3253, and 3321 of the Internal

Revenue Code (18 U. S. C. 88). A demurrer to all counts based on the statute of limitations was overruled (R. 13–15). Daniel Pinkerton's plea of former jeopardy was sustained as to counts 1, 2, and 4 (R. 25–26). After a jury trial, Daniel Pinkerton was found guilty on all counts except counts 1, 2, 4, and 7; Walter Pinkerton was found guilty on all counts except count 7 (R. 32). Walter Pinkerton was sentenced to imprisonment for 30 months and fined $500 under the substantive counts, and under the conspiracy count he was sentenced to two years' imprisonment to run concurrently with the 30 months' sentence (R. 32–35). Daniel Pinkerton was sentenced to 30 months' imprisonment and fined $1,000 under the substantive counts, and to imprisonment for two years and fined $500 under the conspiracy count, the latter prison sentence to run concurrently with the sentence of 30 months (R. 35–38).

The pertinent evidence for the Government supporting the various counts may be summarized as follows:[1]

Count 11.[2]—Petitioners are brothers. The farm on which they both live is owned by Daniel. Their

[1] We omit the evidence as to count 7, since petitioners were acquitted under it.

[2] In summarizing the evidence under this count charging a conspiracy, we refer only to the general evidence not relating to any particular substantive count. The evidence set out below supporting the substantive counts supports the conspiracy count as well.

separate homes are on the same side of the road and about 150 to 200 yards apart. Two well travelled paths ran between the two houses, one at the side of the road and one at the rear of the houses. (R. 55–56, 73, 91–93, 97.) There was evidence of frequent association between the two petitioners (R. 66, 74, 123–124). Investigators had found moonshine whiskey around Daniel's premises before January 15, 1939[3] (R. 50–72). Empty whiskey containers were frequently found in many places around the farm, some of which smelled of moonshine whiskey (R. 64–65, 74, 75, 76, 82, 93, 94, 120). Petitioners had often been arrested for violations of state and federal liquor laws, and in each instance one would make bond for the other (R. 125–131). On one occasion, when the investigators were searching Daniel's house, Walter appeared with a gun and threatened to kill one of them (R. 75, 78–79, 112, 114–115, 117–118, 121–122). On another occasion, an undercover agent drove up to Daniel's house and asked for whiskey. Walter came out and sold him a pint of tax-paid whiskey[4] and a half-pint of alcohol flavored with peach, on which no taxes had been paid, which he obtained from inside Daniel's house. Walter told the agent that the peach mixture was his own

[3] These offenses were barred by the six year statute of limitations. The evidence was admitted solely to show intent (R. 72).

[4] Daniel had a retail liquor dealer's license issued by the federal government (R. 157–158).

and that "he had a good sale on it." (R. 107–109.)

Counts 1, 2, and 4.[5]—On October 7, 1939, investigators caught Daniel with two pints of illicit whiskey on his person and found six more pints concealed in the bushes a short distance from his house. On December 7, 1940, they found three pints of illegal whiskey concealed in the wall of Daniel's house. (R. 73–74, 75, 79, 111, 112, 117, 118, 121.)

Counts 3 and 10.—On May 29, 1940, five investigators searched the vicinity of Walter's house. About 150 yards east of his house they found a "jacket can" buried in the ground which contained two and a half gallons of moonshine whiskey. A well-defined trail led from the house to the buried can. South of the house at the edge of the yard they found a gallon and two pints of moonshine whiskey in buried containers. None of the containers were stamped. Around the premises they found other buried containers which at one time had whiskey in them. (R. 74, 79–80, 82–83, 90–91, 111–112, 116, 117.)

Count 5.—On October 11, 1941, in a bedroom in Walter's house, the investigators found two gallon jugs full of moonshine whiskey on which

[5] These are the counts which were dismissed as to Daniel, since he had previously been convicted for the offenses and had served six months in prison (R. 26, 132).

no taxes had been paid. Walter was in the house when the investigators arrived. (R. 89–90, 114, 116, 118–119, 121.)

Count 6.—In the autumn of 1942 the investigators found a gallon of illegal whiskey concealed in a swamp across the road from Walter's house. It had been raining and identical footprints were observed which led from the front door of Walter's house to the concealed container and back to the house again. (R. 91, 95, 97.)

Count 8.—On February 5, 1943, Walter and Cornelius Porter drove to the next county, where Walter bought nineteen gallons of moonshine whiskey. On the way back they were pursued by officers who had recognized Walter as the driver of the car. They abandoned both car and whiskey, which were taken by the officers. (R. 100–103, 119, 122, 137.) This car, a 1936 Ford, had stood in Daniel Pinkerton's yard for about six weeks in the fall of 1942, undergoing repairs after having been wrecked (R. 95, 97, 98, 99, 119). After it had been repaired, it was driven by Walter until it was taken by the officers (R. 95, 96, 99, 119). Before he began driving the Ford, Walter had been using a Packard; the Packard ran out of tires and was parked in Daniel's yard while Walter used the Ford (R. 76–77, 95–96, 97, 118, 119).

Count 9.—On June 26, 1943, four men drove into Walter's yard. Two of them walked to the

back of the house with Walter. They returned to the car, drove off, and soon a pint of moonshine whiskey was produced. No whiskey had been seen in the car before it entered Walter's yard. Officers saw the car leaving Walter's yard, pursued it, and took the whiskey. (R. 83–87, 96, 97–98.)

In the court's instructions the jury were told, *inter alia*, that before petitioners could be convicted on any of the substantive counts numbered 2 to 9, inclusive, the jury would have to be satisfied beyond a reasonable doubt that they had removed, concealed, or deposited the particular quantity of liquor stated in the count with intent to defraud the United States of the tax thereon; that under substantive counts 1 and 10 the Government would have to show that petitioners unlawfully and knowingly possessed the stated amount of liquor in unstamped containers; and that the jury could convict one or both of the petitioners on any of these counts and acquit one or both. The court also instructed the jury that if they were satisfied that a conspiracy existed between the two petitioners at the time the substantive offenses were committed, and if they were also satisfied that the substantive offenses were the objects of the conspiracy or were committed in furtherance of the conspiracy, they would have a right to convict each of the petitioners of all of the sub-

stantive offenses that had actually been committed.[6] (R. 189–192.)

On appeal, the circuit court of appeals held that counts 1 and 10, which charged possession of whiskey in unstamped containers, were barred by the three year statute of limitations[7] and that the demurrer should have been upheld as to them (R. 243). As to the remaining substantive counts, the court apparently thought that there was sufficient evidence that each of the specified offenses had been committed by one or the other of the two petitioners, although this is not expressly stated in the opinion; and it held that there was sufficient evidence that the two petitioners had actually entered into a conspiracy to commit the substantive

---

[6] In giving these instructions, the court was careful to point out that Daniel could not be found guilty on counts 1, 2, and 4, because he had previously been convicted of the offenses charged in those counts (R. 190, 191; see pp. 5, 7, *supra*).

[7] Section 3748 of the Internal Revenue Code (26 U. S. C. 3748) provides in pertinent part:

> "(a) No person shall be prosecuted, tried, or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be six years—
>
> (1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner,
>
> (2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof, * * *"

offenses and that the act of one conspirator in furtherance of the common plan was the act of all. (R. 244.) Finally, it was held that the judgments should be affirmed, despite the ruling as to counts 1 and 10, since the punishment imposed for the substantive offenses was less than was authorized under any one of the substantive counts (R. 245).

DISCUSSION

Petitioners do not challenge the two year sentences on the conspiracy count. Their sole objection is to the 30 months' concurrent sentences on the substantive counts. The argument begins with an assertion that the evidence shows petitioners are not guilty under the substantive counts remaining in the case (Pet. 10). (Since it is indubitable that all these substantive offenses were committed by either one or the other petitioner, we assume the meaning of this assertion to be that there is no evidence that any of them were committed by *both* petitioners.) The argument then proceeds as follows: The only theory upon which the convictions for the substantive offenses can be upheld is that petitioners were united in a conspiracy at the time the substantive offenses were committed; consequently, on all counts, including the conspiracy count, conviction was had because there was a conspiracy, and all counts thus became in effect separate conspiracy counts;

since the Government does not attempt to establish more than one conspiracy, the various counts set out the various objects of a single conspiracy; under the rule of *Braverman* v. *United States*, 317 U. S. 49, there can be only one two year sentence when the evidence reveals a single conspiracy, even though the single conspiracy may have had many criminal objects (Pet. 10–13). The conclusion is that the 30 month sentences were excessive (Pet. 14).

In the *Braverman* case, the several counts of the indictment each charged a conspiracy, and the evidence revealed that there was a single conspiracy with several distinct criminal objects; but there was no issue in that case as to the accomplishment of the objects of the conspiracy through commission of the substantive crimes. Obviously, this case does not present a parallel situation, for here petitioners were charged with commission of the substantive offenses, and the proof is clear that each of those offenses was actually committed by either one or the other of the two petitioners. We are unable to follow the logic by which petitioners would merge their guilt of the substantive offenses back into the original crime of conspiracy, for it is settled that a conspiracy is an offense separate and distinct from any substantive offenses which are its object and that both the conspiracy and substantive offenses, when accomplished, are separately punishable. *Braverman* v.

United States, 317 U. S. 49, 54; *United States* v. *Rabinowich,* 238 U. S. 78, 85, and cases cited. It is uncontested that petitioners had conspired to commit the substantive offenses with which they were charged[8] and the court below held them jointly guilty of each substantive offense under the commonly accepted rule that a conspirator "is bound by the acts of his fellow conspirators done within the scope of the conspiracy," regardless of whether he participates in the substantive offense. *Kann* v. *United States,* 140 F. 2d 380, 382 (C. C. A. 4), reversed on other grounds, 323 U. S. 88.[9]

However, if guilt of an individual conspirator for an objective offense cannot be sustained upon

---

[8] The conspiracy count charged, among other things, that petitioners had agreed to possess whiskey in unstamped containers and to conceal whiskey with intent to defraud the United States of the tax (R. 8–9). The jury found them guilty on this count, and they do not complain of the sufficiency of the evidence as to it.

[9] The *Kann* case, and *Blue* v. *United States,* 138 F. 2d 351, 359 (C. C. A. 6), certiorari denied, 322 U. S. 736–737; *Baker* v. *United States,* 115 F. 2d 533, 540 (C. C. A. 8), certiorari denied, 312 U. S. 692; and *Tincher* v. *United States,* 11 F. 2d 18, 21 (C. C. A. 4), certiorari denied, 271 U. S. 664, involved prosecutions for use of the mails in furtherance of a joint scheme to defraud and those decisions assimilate the rule in conspiracy cases. *Johnson* v. *United States,* 62 F. 2d 32, 34 (C. C. A. 9), which also applied the rule, was a prosecution, like the instant one, for conspiracy to violate and substantive violations of the internal revenue laws relating to liquor in which some of the co-conspirators had no part whatever in the substantive offense.

the basis alone of the agency principle applied in the *Kann* and other cases cited, Daniel Pinkerton's case presents a further problem, since the only substantive offenses in which he was the principal actor were those charged in counts 1, 2, and 4, which were dismissed as to him (see pp. 5, 7, *supra*). It might be argued, as was held in *United States* v. *Sall*, 116 F. 2d 745, 747 (C. C. A. 3), that "it was not sufficient merely to prove that he was a member of the conspiracy. * * * and that in the course of that conspiracy those particular [substantive] crimes were committed by other conspirators," and that "it is still necessary to prove that the defendant, even though he had joined the conspiracy, had also joined * * * in the concealment of alcohol which constituted the substantive offense with which he is charged." This is the only decision we have found which casts doubt upon the validity of the rule of criminal liability of a co-conspirator for substantive offenses committed by a fellow conspirator in furtherance of the conspiracy. But even conceding the correctness of the *Sall* decision, there was clear evidence that Daniel was an aider and abetter [10] in those offenses committed on the farm property (counts 3, 5, and 9, *supra*, pp. 7–8, 8–9) in

[10] It was, of course, unnecessary that he be indicted as an aider and abetter. 18 U. S. C. 550; *Melling* v. *United States*, 25 F. 2d 92 (C. C. A. 7); *O'Brien* v. *United States*, 25 F. 2d 90, 91 (C. C. A. 7).

which Walter Pinkerton was the principal actor.[11] Daniel was the owner of the farm, the two brothers were closely associated in bootlegging activities, and Daniel obviously knew what Walter was doing (R. 127–131). "* * * one cannot knowingly permit his premises to be used for an unlawful purpose, thereby contributing to the success of the enterprise in a very substantial way, without becoming a party thereto, unless, within a reasonable time after becoming aware of the unlawful use, dependent upon the circumstances of the individual case, he takes steps reasonably calculated to terminate that unlawful use." *Cardinal* v. *United States*, 50 F. 2d 166, 170 (C. C. A. 8). However, in candor, it must be pointed out that the substantive counts were neither submitted to the jury nor the convictions sustained below on the aider and abetter theory, but upon the principle of liability of a conspirator for substantive offenses committed by a co-conspirator in carrying out the unlawful enterprise.

The problem as to Daniel's case does not exist in Walter's, for, as the evidence shows, he was clearly implicated as the principal actor in all of the substantive offenses as to which his conviction

[11] Since Daniel's general sentence under the substantive counts is no more than might have been imposed under any one of them, it is sufficient if his conviction on one of those counts is good. *Hirabayashi* v. *United States*, 320 U. S. 81, 85, 105.

was upheld, except those charged in counts 2 and 4 (see pp. 7–9, *supra*). Hence, whatever may be the disposition which the Court determines upon in Daniel's case, we respectfully submit that the petition should clearly be denied as to Walter.

J. HOWARD MCGRATH,
Solicitor General.

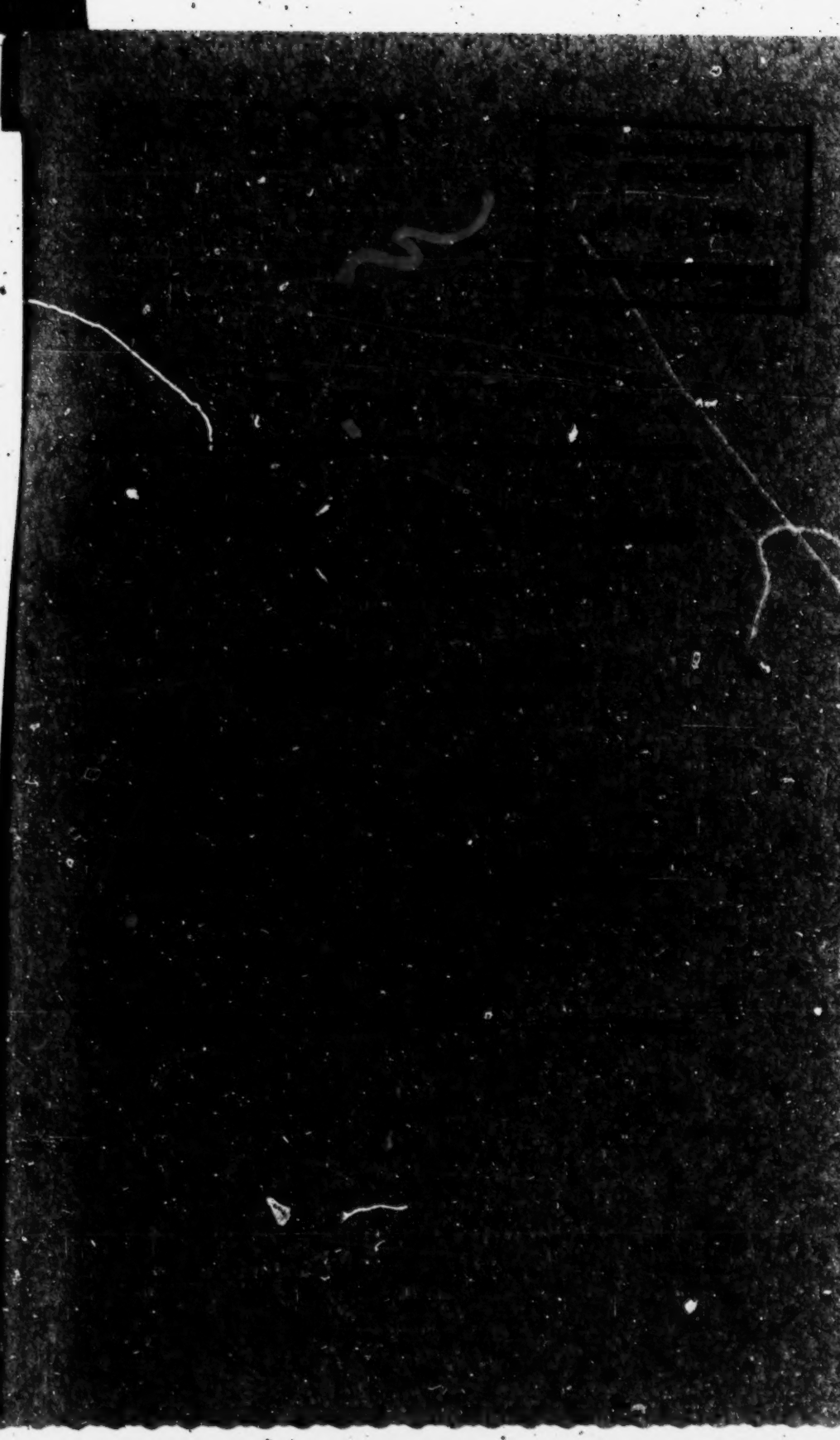
THERON L. CAUDLE,
Assistant Attorney General.

W. MARVIN SMITH,
Special Assistant to the Attorney General.

ROBERT S. ERDAHL,
JOSEPH M. HOWARD,
Attorneys.

FEBRUARY 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946



INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	3
Statutes involved	3
Statement	4
Summary of argument	17
Argument	22
I. A conspiracy to commit a crime and the crime committed pursuant to the conspiracy are distinct offenses and, hence, separately punishable. Neither offense merges into the other	26
II. A conspirator is responsible for criminal acts committed pursuant to the conspiracy or as a natural consequence of the conspiracy, so long as he was a party to the conspiracy when the criminal acts were committed	37
Conclusion	52

CITATIONS

Cases:

Ader v. *United States*, 284 Fed. 13, certiorari denied, 260 N. S. 746	44
American Fur Co. v. *United States*, 2 Pet. 358	43
Baker v. *United States*, 115 F. 2d 533, certiorari denied, 312 U. S. 692	43
Banghart v. *United States*, 148 F. 2d 521, certiorari denied, 325 U. S. 887	31, 34
Blue v. *United States*, 138 F. 2d 351, certiorari denied, 322 U. S. 736	43
Boyd v. *United States*, 142 U. S. 450	21, 41
Brady v. *United States*, 24 F. 2d 399	34
Braverman v. *United States*, 317 U. S. 49	9, 10, 18, 25, 26, 30
Brooks v. *United States*, 267 U. S. 432	11
Brown v. *United States*, 150 U. S. 93	43
Burton v. *United States*, 142 Fed. 57	44
Butler v. *People*, 125 Ill. 641	42
Cardinal v. *United States*, 50 F. 2d 166	40
Carter v. *McClaughry*, 183 U. S. 365	19, 28, 32
Chambers v. *United States*, 237 Fed. 513	44
Claasen v. *United States*, 142 U. S. 140	11
Clune v. *United States*, 159 U. S. 590	27
Cochran v. *United States*, 41 F. 2d 193	43

691159—46——1

Cases—Continued.

	Page
Conn. Mut. Life Ins. Co. v. *Hillmon*, 188 U. S. 208	43
Cooper v. *State*, 60 Tex. Cr. Rep. 405	42, 43
Crawford v. *United States*, 212 U. S. 183	31
Direct Sales Co. v. *United States*, 319 U. S. 703	46
Evans v. *United States* (No. 2), 153 U. S. 608	11.
Ford v. *United States*, 273 U. S. 593	30
Freeman v. *United States*, 146 F. 2d 978	31
Frohwerk v. *United States*, 249 U. S. 204	30, 31
Gebardi v. *United States*, 287 U. S. 112	31, 34
Glasser v. *United States*, 315 U. S. 60	31
Gorin v. *United States*, 312 U. S. 19	11
Hanna v. *People*, 86 Ill. 243	42
Hart v. *United States*, 112 F. 2d 128	43
Heike v. *United States*, 227 U. S. 131	28
Hirabayashi v. *United States*, 320 U. S. 81	11
Hitchman Coal and Coke Co. v. *Mitchell*, 245 U. S. 229	46
Hyde v. *United States*, 225 U. S. 347	25, 40
Johnson v. *United States*, 62 F. 2d 32	44
Joplin Mercantile Co. v. *United States*, 236 U. S. 531	31
Kann v. *United States*, 140 F. 2d 380, reversed on other grounds, 323 U. S. 88	43
Krench v. *United States*, 42 F. 2d 51	31
Laughter v. *United States*, 259 Fed. 94, certiorari denied, 249 U. S. 613	35
Mackett v. *United States*, 90 F. 2d 462	43
Melling v. *United States*, 25 F. 2d 92	40
Morgan v. *Aderhold*, 73 F. 2d 171	32
Morgan v. *Devine*, 237 U. S. 632	32
Norris v. *United States*, 34 F. 2d 839, reversed on other grounds, 281 U. S. 619	34
Nudd v. *Burrows*, 91 U. S. 426	43
O'Brien v. *United States*, 25 F. 2d 90	41
Odom v. *State*, 172 Miss. 687	42
Parmagini v. *United States*, 42 F. 2d 721	32
People v. *Bringhurst*, 192 Cal. 748	42
People v. *Foley*, 59 Mich. 553	42
People v. *Lawrence*, 143 Cal. 148	42
People v. *Michalow*, 229 N. Y. 325	42, 43
People v. *Payne*, 359 Ill. 246	43
People v. *Pierce*, 387 Ill. 608	43
People v. *Raber*, 168 Cal. 316	42
People v. *Tavormina*, 257 N. Y. 84	33
People v. *Vasquez*, 49 Cal. 560	42
Pettibone v. *United States*, 148 U. S. 197	31
Pierce v. *United States*, 252 U. S. 239	11, 31
Pinkerton v. *United States*, 145 F. 2d 252	7

Cases—Continued. Page

Freeman v. *United States*, 244 Fed. 1, certiorari denied, 245 U. S. 654 — 44
Romero v. *State*, 101 Nebr. 650 — 42
St. Clair v. *United States*, 154 U. S. 134 — 39, 43
Sneed v. *United States*, 298 Fed. 911, certiorari denied, 265 U. S. 590 — 32, 33
Spies v. *People*, 122 Ill. 1 — 42, 43
State v. *Furney*, 41 Kan. 115 — 42
State v. *Heyward*, 2 Nott & McCord (S. C.) 312 — 42, 43
Thornton v. *United States*, 271 U. S. 414 — 31
Tincher v. *United States*, 11 F. 2d 18, certiorari denied, 271 U. S. 664 — 44
United States v. *Britton*, 108 U. S. 199 — 31
United States v. *Dietrich*, 126 Fed. 664 — 34
United States v. *Falcone*, 311 U. S. 205 — 46
United States v. *Fox*, 95 U. S. 670 — 45
United States v. *Gooding*, 12 Wheat. 460 — 43
United States v. *Hirsch*, 100 U. S. 33 — 26
United States v. *Holte*, 236 U. S. 140 — 31
United States v. *Katz*, 271 U. S. 354 — 34
United States v. *McElvain*, 272 U. S. 633 — 29
United States v. *N. Y. C. & H. R. R. Co.*, 146 Fed. 298 — 34
United States v. *Rabinowich*, 238 U. S. 78 — 10, 27, 29, 30
United States v. *Reed*, 117 F. 2d 808 — 2
United States v. *Sager*, 49 F. 2d 725 — 34
United States v. *Sall*, 116 F. 2d 745 — 22, 46, 48
United States v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 — 49
United States v. *Stevenson (No. 2)*, 215 U. S. 201 — 28
United States v. *Wexler*, 79 F. 2d 526, certiorari denied, 297 U. S. 703 — 31, 32, 34
United States v. *Zeuli*, 137 F. 2d 845 — 34
Weiss v. *United States*, 103 F. 2d 759 — 35
Wiborg v. *United States*, 163 U. S. 632 — 43
Williamson v. *United States*, 207 U. S. 425 — 31
Wong Tai v. *United States*, 273 U. S. 77 — 31

Statutes:

Criminal Code:
Section 37 (18 U. S. C. 88) — 4
18 U. S. C. 338 — 43
Section 332 (18 U. S. C. 550) — 40

Internal Revenue Code (26 U. S. C. 2803, 3321):
Section 2803 — 3, 5
Section 2810 — 5
Section 2831 — 5
Section 2833 — 5
Section 2834 — 6

Statutes—Continued.

	Page
Internal Revenue Code—Continued.	
Section 3253	6
Section 3321	4, 5, 6, 9
26 U. S. C. 3748 (a)	9
Miscellaneous:	
37 A. L. R. 7	33
75 A. L. R. 1405	33
Annual Report of the Attorney General for the Fiscal Year 1925	35
1 Bishop, Criminal Law, 9th ed., p. 466	45
Criminal Appeals Rules (18 U. S. C. following 688):	
Rule 1	2
Rule 3	2
Rule 4	2
Rule 13	2
Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States*, p. 611	24
Shyre, *Criminal Responsibility for the Acts of Another*, 43 Harv. L. Rev. 689, 695, 708	41, 45

In the Supreme Court of the United States

OCTOBER TERM 1945

No. 719

W. DANIEL PINKERTON AND WALTER G. PINKERTON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 242–245) is reported at 151 F. 2d 499.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 30, 1945 (R. 246), and a petition for rehearing was denied December 1, 1945 (R. 248). The petition for a writ of certiorari was filed January 4, 1946, and was granted March 4, 1946 (R. 248). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See

also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.[1]

[1] In the circuit court of appeals the Government moved to dismiss the appeal on the ground that the notice of appeal was filed too late. The circuit court of appeals stated (R. 243) that "Due to the peculiar facts relating to the filing of the notice of the taking of the appeal, and since the case is being affirmed on the merits, the court makes no decision on the motion to dismiss the appeal; it being the view of the court that in such action the appellee obtains the same result as it seeks by the motion to dismiss the appeal, and there is no injury to the appellants." We think the court could properly have denied the motion to dismiss the appeal. The notice of appeal was filed on May 9, 1945 (R. 215). In motions in the district court to correct the record following the motion to dismiss the appeal, petitioners' attorneys claimed that although petitioners were orally sentenced on the night of May 2, 1945, and although the written judgments of conviction and commitments bore the date of May 2 (R. 32–38), they were not written up or actually filed in the district court clerk's office until May 3 (R. 38–39, 42–43). The district judge did not question these assertions in denying the motions but rested upon the sentencing of the petitioners and the issuance of temporary commitments on May 2 (R. 39–42, 44–45). Rule 1 of the Criminal Appeals Rules then in effect (18 U. S. C. following 688) provided that "The judgment setting forth the sentence shall be signed by the judge who imposes the sentence and shall be entered by the clerk"; Rule 3 provided that an appeal shall be taken within five days "after entry of judgment of conviction"; under Rule 13 Sundays are excluded. If the judgments were not entered until May 3 the appeal was timely, being within the five-day period, excluding the intervening Sunday. The record does not contain a statement of the docket entries in the case in the form provided by Rule 4 of the Criminal Appeals Rules. Under these circumstances we have communicated with the United States Attorney, who advises that the judgments of conviction were not actually entered by the clerk until May 3. The appeal was therefore timely. Cf. *United States* v. *Reed*, 117 F. 2d 808, 809 (C. C. A. 5).

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether on petitioners' convictions upon an indictment charging in one count a conspiracy to violate various provisions of the Internal Revenue Code and in other counts substantive offenses in violation of one of those provisions, they could validly be sentenced on the substantive counts to a term of imprisonment exceeding the two year maximum penalty provided for by the conspiracy statute, which had been imposed upon them on the conspiracy count.

2. Whether a conspirator may be convicted of a substantive offense in which he did not directly participate where the crime was committed by another conspirator pursuant to the conspiracy or where its commission was a natural consequence of the conspiracy.

STATUTES INVOLVED

Section 2803 of the Internal Revenue Code (26 U. S. C. 2803) provides in pertinent part:

> (a) No person shall transport, possess * * * any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal-revenue taxes imposed on such spirits. * * *
>
> * * * * *
>
> (g) Any person who violates any provi-

> sion of this section * * * shall on conviction be punished by a fine not exceeding $1,000, or by imprisonment at hard labor not exceeding five years, or by both. * * *

Section 3321 of the Internal Revenue Code (26 U. S. C. 3321) provides in pertinent part:

> (a) Every person who removes, deposits, or conceals, or is concerned in removing, depositing, or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine of not more than $5,000 or be imprisoned for not more than 3 years, or both.

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than 2 years, or both.

STATEMENT

An eleven-count indictment was returned against petitioners in the District Court for the Northern District of Alabama on April 17, 1945, the first ten counts charging petitioners with violations of the Internal Revenue Code, and the

last count charging petitioners with conspiracy to violate certain provisions of the Code (R. 2–13). Counts 1 and 10 (R. 2, 7–8) charged petitioners with unlawful possession of whiskey in unstamped containers on October 7, 1939, and May 29, 1940, respectively (26 U. S. C. 2803, *supra*, pp. 3–4). Counts 2 to 9, inclusive (R. 3–7), charged that on various dates between October 7, 1939, and June 26, 1943, petitioners had unlawfully removed, deposited, and concealed specified quantities of whiskey with intent to defraud the United States of the tax imposed thereon (26 U. S. C. 3321, *supra*, p. 4). Count 11 (R. 8–13) charged petitioners and others (not made defendants) with conspiring from August 12, 1938, to the fall of 1943 to violate various sections of the Internal Revenue Code, viz., carrying on the business of a distiller of spirituous liquor without having given the required bond (26 U. S. C. 2833); having in their possession unregistered stills (26 U. S. C. 2810); engaging in the business of a distiller of spirituous liquor with intent to defraud the United States of the tax imposed thereon (26 U. S. C. 2833); working in and carrying raw materials to an unregistered distillery (26 U. S. C. 2831); transporting, possessing, buying, and selling whiskey in unstamped containers (26 U. S. C. 2803); removing, depositing, and concealing whiskey with intent to defraud the United States of the tax imposed

thereon (26 U. S. C. 3321, *supra*, p. 4); carrying on the business of a retail liquor dealer without payment of the required tax (26 U. S. C. 3253); carrying on the business of a wholesale liquor dealer without payment of the required tax (26 U. S. C. 3253); and making mash at other than an authorized distillery (26 U. S. C. 2834). The count set forth numerous overt acts alleged to have been committed pursuant to the conspiracy and to effect its objects (R. 10–13).[2] Petitioners interposed a demurrer to the indictment on various grounds, including that on the face of the indictment the offenses charged were barred by the statute of limitations (R. 13–15). They also filed a plea of former jeopardy as to the conspiracy count (R. 18) to which the United States

---

[2] The concurrence of dates and persons involved indicates that several of the overt acts relate to offenses charged in the substantive counts. Cf. overt act 2 (R. 10) with count 1 (R. 2); overt act 4 (R. 11) with count 10 (R. 7); overt act 6 (R. 11) with count 4 (R. 4); overt act 9 (R. 12) with count 5 (R. 4–5); overt act 13 (R. 12) with count 7 (R. 5–6); overt act 14 (R. 12) with count 8 (R. 6); overt act 15 (R. 12) with count 9 (R. 7).

demurred (R. 19–25).[3] The trial court overruled petitioners' demurrer to the indictment and sustained the Government's demurrer to the plea of former jeopardy (R. 25–26). Petitioner W. Daniel Pinkerton, additionally, pleaded that he had previously been convicted of the offenses charged in counts 1, 2, and 4 (R. 16–17). The Government did not oppose this plea and it was sustained (R. 26).

After a jury trial W. Daniel Pinkerton was found guilty on substantive counts 3, 5, 6, 8, 9 and 10 and on count 11, the conspiracy count; Walter G. Pinkerton was found guilty on substantive counts 1 to 6, inclusive, and counts 8 to 10, inclusive, and on the conspiracy count, count 11

[3] On petitioners' appeal, their conviction on an earlier single-count indictment charging a conspiracy to violate most of the sections of the Internal Revenue Code involved in the instant proceeding was reversed and the cause remanded because of errors in the charge. See *Pinkerton* v. *United States*, 145 F. 2d 252 (C. C. A. 5). It appears that after this reversal petitioners were reindicted in the present case (see Government's demurrer to the former jeopardy plea, R. 19–25). The new indictment, in so far as it charged a conspiracy, did not cover the same period as the earlier indictment; it charged 16 as compared with 19 overt acts; and it added as an object the removal, depositing, and concealment of whiskey with intent to defraud the United States of the tax, an offense proscribed by 26 U. S. C. 3321 (cf. R. 8 to 13 with 145 F. 2d at 253).

(R. 32).[4] Walter was sentenced generally on the substantive counts to imprisonment for a term of 30 months and to pay a fine of $500, and on the conspiracy count he was sentenced to imprisonment for a term of two years, the sentence to run concurrently with the sentence imposed on the substantive counts (R. 32–35). Daniel was sentenced generally on the substantive counts to imprisonment for a term of 30 months and to pay a fine of $1,000, and on the conspiracy count he was sentenced to imprisonment for a term of two years and to pay a fine of $500, the sentence to imprisonment to run concurrently with the imprisonment sentence imposed on the substantive counts (R. 35–38). Petitioners appealed to the Circuit Court of Appeals for the Fifth Circuit assigning 68 errors (R. 218–235), but only certain ones were called specially to the attention of the court (R. 243). The court considered these and held them, with one exception, to be without merit. It ruled that counts 1 and 10, the substantive counts charging possession of liquor in unstamped containers, were barred by a three-year statute of limitations and hence that petitioners' demurrer

[4] As has been previously stated, *supra*, p. 7, Daniel's plea of former jeopardy as to counts 1, 2, and 4 was sustained. Count 7, on which both petitioners were acquitted, charged that on December 17, 1942, they unlawfully removed, deposited, and concealed 19 gallons of whiskey with intent to defraud the United States of the tax imposed thereon (R. 5–6).

as to them should have been sustained (R. 243).[5] Since, however, each of the remaining substantive counts upon which the jury had returned a verdict of guilty involved 26 U. S. C. 3321, the removal and concealment statute, which permits a maximum punishment of three years' imprisonment and a fine of $5,000 (*supra*, p. 4), the validity of the smaller general sentence of a fine and imprisonment imposed upon each petitioner under

---

[5] The applicable statute of limitations (26 U. S. C. 3748 (a)) is discussed in *Braverman* v. *United States*, 317 U. S. 49, 54–55. It would seem from that discussion that the circuit court of appeals ruled correctly that counts 1 and 10, the possession counts, were barred by the three-year limitation; it was not an element of the offense which those counts charged that there be any wilful attempt to evade or defeat the payment of federal taxes. The other substantive counts related to offenses which involved defrauding or attempting to defraud the United States, and hence there can be no doubt that they are covered by the six-year limitation period.

In so far as the conspiracy count is concerned, the circuit court of appeals was of the view that some of the overt acts, presumably some of them relating to the possession of liquor in unstamped containers, were governed by a three-year limitation, but thought that that was immaterial since other overt acts alleged and proved were subject to a six-year limitation (R. 245). The conspiracy count in the instant case does not differ in essence so far as the objective offenses are concerned from the conspiracy indictment in the *Braverman* case (cf. pp. 5–6, *supra*, with footnote 1, p. 50 of the *Braverman* decision). In that case the Court held that the various objects of the conspiracy required the application of a six and not a three-year period of limitation since the larger period applies not only to a conspiracy having as its object the commission of an offense in which defrauding or attempting to defraud the United States is an element but also to a conspiracy which

the substantive counts was not affected by the court's ruling as to counts 1 and 10 (cf. R. 245),[6] and the judgments of conviction were consequently affirmed.

---

involves an attempt to evade or defeat the payment of federal taxes. Consequently, the circuit court of appeals was, we submit, wrong in assuming that a three-year period was applicable in any respect to the conspiracy count; the conspiracy charge was correctly framed on the assumption that a six-year period of limitation applied (see R. 8), and the district court correctly charged that that was the applicable period (R. 180–181). Cf. *United States* v. *Rabinowich*, 238 U. S. 78.

In any event, as the conspiracy count was finally submitted to the jury (see p. 17, *infra*), there can be no doubt that a six-year period governed, since the only objects of the conspiracy which were not withdrawn from the jury's consideration were objects which manifestly related either to the defrauding of the Government, or attempts to defeat or evade the payment of federal taxes.

The earlier conspiracy indictment had been framed on the assumption that a three-year limitation period governed and the convictions were reversed because the trial judge did not adequately charge on that basis (see 145 F. 2d at 253, 254). The Department file indicates that the United States Attorney first became aware of the *Braverman* decision upon the remand of the case, and consequently secured the present indictment, which was formulated upon a six instead of a three-year limitation basis. He apparently added the substantive counts because, under his understanding that a six-year limitation period was applicable, he felt that there were enough substantive offenses as to which petitioners could be successfully prosecuted to justify him in including them in the indictment.

[6] In their petition for a writ of certiorari (p. 2) petitioners raise the question whether the court's ruling on counts 1 and 10 invalidates petitioners' general sentences on the substantive

The evidence to support the counts of the indictment here involved may be summarized as follows:

Count 11 (the conspiracy count)[7]—Petitioners

counts. The question is not argued either in the petition or in petitioners' brief on the merits. However, in *Claasen* v. *United States*, 142 U. S. 140, a similar situation was involved. A verdict of guilty was returned as to each of five counts of an indictment and a general sentence was imposed. This Court considered it necessary to determine that only one of the five counts was sufficient, since the sentence was within the punishment permitted for a single offense. The Court said that "there is no reason why that sentence should not be applied to any one of the counts which was good" (p. 147), and that "it is settled law in this court, and in this country generally, that in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment, because, in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only. *Locke* v. *United States*, 7 Cranch, 339, 344; *Clifton* v. *United States*, 4 How. 242, 250; *Snyder* v. *United States*, 112 U. S. 216; *Bond* v. *Dustin*, 112 U. S. 604, 609; 1 Bishop Crim. Pro. § 1015; Wharton Crim. Pl. & Pract. § 771." See also *Evans* v. *United States* (*No. 2*), 153 U. S. 608, 609, another general sentence case. Analogously, the same result has been reached in concurrent sentence cases. See *Hirabayashi* v. *United States*, 320 U. S. 81, 85, 105; *Gorin* v. *United States*, 312 U. S. 19, 22, 33; *Brooks* v. *United States*, 267 U. S. 432, 441. In several of the concurrent sentence cases the two types of decisions are cited indiscriminately. See *Brooks* v. *United States*, *supra*; *Pierce* v. *United States*, 252 U. S. 239, 242, 252–253.

[7] In summarizing the evidence under this count, we refer only to the general evidence which does not relate to a particular substantive count. The evidence set out below supporting the substantive counts supports the conspiracy count as well.

are brothers. They live on a farm of 96 acres located in Fayette County, Alabama. The farm is owned by Daniel. They have separate homes on the same side of the road. The homes are about 150 to 200 yards apart. Two well travelled paths ran between the two houses, one at the sides near the road and the other at the rear of the houses (R. 97, 54–56, 73, 91–93, 148, 159, 164).[8] Petitioners appeared to be in frequent contact with each other (R. 66, 74, 123–124, 159). Beginning in 1935 Daniel had a retail liquor dealer's license issued by the Federal Government (R. 157–158), although his home county was a dry county (R. 74, 149, 157). Investigators had found moonshine whiskey around Daniel's house at various times between January 1935 and August 1938 (R. 50–72).[9] On one of these occasions Daniel was apprehended carrying a jug of moonshine whiskey (R. 62–63). He had also been observed carrying to automobiles bottles which he had presumably secured from a thicket near his house. Moonshine whiskey had been discovered in this thicket (R. 68–69).

Between 1935 and 1942 the investigators found empty containers at various points on the property. Some of these containers smelled of moon-

[8] Diagrams of the farm appear at pages 55 and 92 of the record.

[9] These offenses were barred by the six-year statute of limitations (*supra*, p. 9, footnote 5). This evidence was admitted solely to show intent and the existence of a conspiracy at that time (R. 72, 180–181).

shine whiskey (R. 64–65, 74, 75, 76, 82, 91, 93, 94, 120). Between 1938 and 1942 petitioners had often been arrested for violations of the state and federal liquor laws, and they would make bond for each other (R. 125–131, 165). On one occasion in August 1940, when the investigators were searching Daniel's house, at which time Daniel was present, Walter appeared with a rifle and threatened to kill one of them (R. 75, 78–79, 112, 117–118). On another occasion, April 15, 1941, an undercover agent drove up to Daniel's house and asked to purchase whiskey. Walter was there, and he sold the agent a pint of tax-paid whiskey and a half-pint of peach alcohol, on which no taxes had been paid. Walter went into Daniel's house for the peach alcohol, and he told the agent that the peach mixture was his own and that he had a "good sale on it" (R. 107–109).

Counts 2 and 4 [10]—On October 7, 1939, investigators observed Daniel go to a "stump hole" near his house, reach into the hole and take out two bottles, which the investigators found to contain two pints of moonshine whiskey. They then went to the hole where they found six pints of moonshine whiskey in tax-paid bottles (R. 73–74, 111, 117). On December 7, 1940, they found three pints of moonshine whiskey concealed in the wall

[10] All of the substantive counts here involved charged removal, deposit, and concealment of whiskey. As has been stated above (*supra*, p. 7), counts 2 and 4 were dismissed as to Daniel on his plea of former jeopardy.

of Daniel's garage. Daniel said he did not know how the whiskey got there (R. 75, 112, 118).

Count 3—On May 29, 1940, five investigators searched the vicinity of Walter's house. About 150 yards east of the house they found a "jacket can" buried in the ground. The can contained two and a half gallons of moonshine whiskey. A well-beaten trail led from Walter's house to the place where the can was buried. South of the house at the edge of the yard they found a gallon and two pints of moonshine whiskey in a jug and in bottles. Around the house and the yard they found other containers which at one time had had whiskey in them (R. 74, 79–80, 82–83, 90–91, 111–112, 117).

Count 5—On October 11, 1941, the investigators went to Walter's house. Walter was present. They found two gallon jugs in a bedroom. The jugs were filled with moonshine whiskey. (R. 89–90, 114, 116, 118–119, 121.)

Count 6—In the autumn of 1942 the investigators found a gallon of moonshine whiskey in a glass jug concealed in a swamp across the road from Walter's house. It had been raining and the investigators saw identical footprints which led from the front door of Walter's house to the swamp and back to the house (R. 91, 95, 97).

Count 8—On February 5, 1943, Walter and Cornelius Porter (a co-conspirator) drove to the next county, where Walter purchased nineteen

gallons of moonshine whiskey. On the way back they were pursued by officers. They abandoned the car and the whiskey, which were seized by the officers (R. 100–101, 119–120). The car, a 1936 Ford, had in the fall of 1942 been in Daniel's yard for about six weeks undergoing repairs (R. 95–96, 99, 119).

Count 9—On June 26, 1943, four men drove into Walter's yard. Two of the men walked to the back of the house with Walter. They returned to the car, drove off, and one of the men who had been at the house produced a pint of moonshine whiskey. No whiskey had been seen in the possession of the occupants of the car before it entered Walter's yard. Officers saw the car leave, pursued it, and seized the whiskey (R. 84–87, 96, 97–98).

Each petitioner, testifying in his own defense, denied any implication in the offenses charged (R. 148–154, 155–169).[11] While petitioners did not move for a directed verdict of acquittal either at the close of the Government's case or at the close of all the evidence (see R. 132, 173), they requested the judge to charge the jury in respect of each count that if they believed the evidence they must find petitioners not guilty. The judge refused so to charge except in respect of Daniel as to counts 1, 2, and 4 (R. 197, 207–210), as to

[11] In respect of counts 1 2, and 4 Daniel relied on his plea of former jeopardy (R. 155).

which counts Daniel had pleaded former jeopardy (*supra*, p. 7).

The trial judge, having instructed the jury at length in respect of the conspiracy count (R. 173–182), and having commented on the evidence (R. 183–189), told the jury in respect of the substantive counts 2 to 9, inclusive, that in order to find petitioners guilty it was necessary for the Government to prove beyond a reasonable doubt that the whiskey involved in those counts had been removed, deposited, or concealed "by the defendants, or by one of them" (R. 190). He then told the jury that if they were satisfied from the evidence that at the time the substantive offenses were committed petitioners were "in an unlawful conspiracy, as I have heretofore defined unlawful conspiracy to you, then you would have a right * * * to convict each of these defendants on all these substantive counts, provided the acts referred to in the substantive counts were acts in furtherance of the unlawful conspiracy or object of the unlawful conspiracy, which you have found from the evidence existed" (R. 191–192). In the portion of his charge dealing with the conspiracy count the judge had stated to the jury the substance of that count, including the various objects of the conspiracy as set forth in the indictment (R. 174–176). After doing this, he at length defined a conspiracy in the traditional terms (R. 177–182).

The only exception petitioners took to the judge's colloquial charge related apparently to his instruction that each petitioner could be convicted of the substantive offenses if the jury found that they had been committed pursuant to the conspiracy, stating that Daniel had been confined to prison when some of those offenses had been committed (R. 194).

At petitioners' request the judge withdrew from the jury's consideration all objects of the conspiracy, except that petitioners conspired to remove, deposit, and conceal whiskey with intent to defraud the Government of the tax imposed thereon, that they conspired to transport, possess, buy, and sell whiskey in unstamped containers, and, apparently, in respect of sales by Walter, that they conspired that he should carry on the business of a retail liquor dealer without having paid the required tax[12] (see R. 198–199).

SUMMARY OF ARGUMENT

Petitioners' principal contention is that, under the circumstances of this case, they could not be sentenced to imprisonment for more than the two-year maximum provided by the conspiracy

[12] Since Daniel had a retailer liquor dealer's license, we assume that petitioners' requested instruction No. A19 (R. 199) was intended to absolve them from liability on the conspiracy count insofar as an object of the conspiracy may have been retail sales by Daniel without the payment of the required tax.

statute; therefore, they claim that the thirty months' sentence imposed as to each of them on the substantive counts is invalid. They argue that since their conviction on the substantive counts depends solely upon the fact that the jury found that these offenses were committed pursuant to a conspiracy, each of the substantive counts became a separate conspiracy count, but since there was only a single conspiracy charged and proved, under the rule enunciated in *Braverman* v. *United States*, 317 U. S. 49, only a single sentence not exceeding the maximum two-year penalty provided by the conspiracy statute could be imposed.

The crux of petitioners' argument is the notion that when a substantive offense is committed pursuant to a conspiracy to commit that offense, the substantive offense cannot be punished because it merges into the conspiracy. We show that this notion is completely without foundation. We then show that each petitioner's guilt of a substantive offense in the commission of which he had no direct participation may be established by showing that he was a party to a conspiracy in furtherance of which the offense was committed. We conclude that the thirty months' sentences on the substantive counts are valid.

Preliminarily, it is clear that the *Braverman* case is of no aid to petitioners. The Court there held that where several counts of an indictment

each charge a conspiracy to violate a different statute and the evidence shows only a single conspiracy, a conviction on the several counts will not sustain a sentence exceeding the maximum penalty for a single violation of the conspiracy statute, since, there being only one agreement, there is only one offense. That situation is obviously not parallel with the situation here presented.

I

This Court has recognized on numerous occasions and in varying situations that a conspiracy to commit a crime is an offense entirely distinct and separate from the crime which is the object of the conspiracy. These decisions, if they do not directly hold that the two offenses may be tried and punished as independent offenses, make that answer inevitable. A decision closely in point, if not dispositive in principle, is *Carter* v. *McClaughry*, 183 U. S. 365.

Until petitioners made the point, no one, so far as we have discovered, has ever urged that the objective offense when committed merges into the conspiracy. The former doctrine that a conspiracy merged into the substantive offense when that was committed is now generally rejected for the reason that the bases upon which it rested no longer exist. Any application of a merger doctrine would thwart the manifest congressional

purpose of permitting punishment not only of the objective offense, but also of the conspiracy.

While attention has been called to the abuse which may result from the practice of including conspiracy and substantive counts in certain cases, the criticism is without relevance in this case. The criticism is directed against the tacking on of a conspiracy count for what is purely joint substantive criminal activity. This was not the situation here.

II

Daniel's guilt on the substantive counts here involved rests upon the trial judge's instruction to the jury that if they found that at the time the substantive offenses were committed petitioners were in an unlawful conspiracy and that the substantive offenses charged were committed in furtherance of the conspiracy or its objects, each petitioner could be found guilty of the substantive offenses. The circuit court of appeals appears to have approved this theory of guilt. We believe that the theory is correct and that on that basis the instruction furnished the jury with a proper standard for ascertaining Daniel's guilt of the substantive offenses.

Numerous decisions have held that a party to a conspiracy to commit a crime may be held criminally responsible for the commission by another of the objective offense or of an offense which is the

natural consequence of the conspiracy if he was a party to the conspiracy at the time of the commission of the offense. Responsibility in cases of this kind rests not upon any principle peculiar to the law of criminal conspiracy, but upon the rule, which no one doubts, that a person who counsels, procures, or commands another to commit a crime is himself also guilty of the crime because natural reason and elementary principles of causation so demand. The theory has been approved by this Court. *Boyd* v. *United States*, 142 U. S. 450, 455–456. It has been applied by the lower federal courts in numerous mail fraud cases in which a conspirator has been held substantively responsible for a mailing done by another pursuant to a conspiracy to violate the mail fraud statute.

We recognize, of course, that the doctrine cannot be extended to fasten liability for the commission of the substantive offense upon one who joins the conspiracy after the commission of the offense, since it is clear that an individual's ratification of another's criminal act cannot form the basis of criminal liability. No different principle is involved even in conspiracy prosecutions by the application of the doctrine that one who joins a conspiracy after its inception is bound by the acts and declarations of his co-conspirators notwithstanding they occur prior to his association with the conspiracy. The guilt of the later participant does not flow from the fact that the

earlier participants may have committed criminal acts, since the gist of the offense is the agreement to commit a crime and not the crime itself; the later participant becomes criminally responsible for the conspiracy because, with the requisite knowledge and intent, he associates himself with an existing combination to commit crime; the prior acts and declarations are utilized to establish the illegal character of the combination.

United States v. *Sall*, 116 F. 2d 745 (C. C. A. 3), the only decision we have found which fails to hold a conspirator for substantive offenses committed pursuant to the conspiracy, is unsound. It overlooks the rationale of causation upon which the rule rests.

On the basis of the nature of the conspiracy which was submitted for the jury's consideration, there can be no doubt that the substantive offenses were, at the least, natural consequences of the conspiracy.

ARGUMENT

Petitioners' principal contention (Br. 7, 9, 23) is that, under the circumstances of this case, they could not be sentenced to imprisonment for more than the two-year maximum term provided by the conspiracy statute (*supra*, p. 4); therefore, they claim that the thirty months' sentence imposed as to each of them on the substantive counts[13] is unsupportable. Their contention

[13] Each petitioner was also sentenced to a fine on the substantive counts (*supra*, p. 8).

arises in this way: The trial court permitted each petitioner to be convicted under substantive counts as to which the evidence did not show he was a direct participant: Walter as to counts 2 and 4, and Daniel as to counts 3, 5, 6, 8 and 9.[14] It did this by virtue of its instruction (*supra*, p. 16) that each petitioner could be found guilty of a substantive offense which he, himself, did not commit directly, if that offense was committed pursuant to a conspiracy to which he was a party or to effect the objects of such a conspiracy.[15]

Hence, petitioners' conviction upon the substantive counts[16] must depend solely upon the fact that

---

[14] As to Walter, substantive counts 1, 7 and 10, and as to Daniel, substantive counts 1, 2, 4, 7 and 10, have been eliminated from the case for reasons which have been indicated.

[15] The question is of no importance as to Walter since the evidence showed, *supra*, pp. 14–15, that he was the direct actor in respect of counts 3, 5, 6, 8 and 9, and his general sentence of thirty months' imprisonment and a fine of $500 on the substantive counts is supportable under either one of the counts enumerated (see footnote 6 *supra*, pp. 10–11). Petitioners seem to recognize this, because their brief on the merits is devoted principally to Daniel's conviction (Br. 13, 15, 21, 22).

The question is, however, vital to Daniel, since the only substantive counts which may be considered as to which he was the direct actor are counts 2 and 4, and as to these he had been convicted in a prior proceeding. His general sentence of thirty months' imprisonment and a fine of $1,000 must rest, therefore, upon substantive counts 3, 5, 6, 8 and 9, offenses in which he did not directly participate.

[16] But see footnote 15, as to Walter.

the jury found that these offenses were committed pursuant to a conspiracy. "With this in mind," they say (Br. 15), "we are now faced with the fact that each of the substantive counts become separate counts, each charging a conspiracy to violate a separate and distinct Internal Revenue Law of the United States." But, they continue, there was but "a single agreement to commit acts in violation of several penal statutes," which, under the rule enunciated by this Court in *Braverman* v. *United States*, 317 U. S. 49, will sustain only a single sentence not exceeding the maximum penalty of two years' imprisonment provided for by the conspiracy statute (*supra*, p. 4). From this the conclusion is reached that the thirty months' sentence imposed on each petitioner on the substantive counts is excessive (Br. 13–23).[17]

---

[17] In petitioners' brief on the merits (Br. 22), but not in the petition for a writ of certiorari, it is also contended that there is not sufficient evidence to sustain Daniel's conviction on the conspiracy count and that if he was ever a party to a conspiracy his dealings in illegal whiskey ceased after the commission of the substantive offenses for which he was previously convicted and before the commission of the substantive offenses in which Walter was the direct actor, i. e., that he withdrew from the conspiracy prior to Walter's misdeeds. This contention was evidently not made in the circuit court of appeals for it is not discussed in that court's opinion, and the opinion discusses such of the numerous assignments of error as were pressed upon the court (R. 243). It would therefore seem that the contention need not be considered here. See Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States*, p. 611. In any event, we think that the evidence of continuing cooperation

It is evident that the crux of petitioners' argument is the notion that when a substantive offense is committed pursuant to a conspiracy to commit that offense, the substantive offense cannot be separately punished because it merges into the conspiracy. This notion is completely without foundation, as we will first show. We will then endeavor to show that each petitioner's guilt of a substantive offense in the commission of which he had no direct participation may be established by showing that he was a party to a conspiracy in furtherance of which the offense was committed. We conclude that the thirty months' sentences on the substantive counts are valid.

Preliminarily, it is clear that the *Braverman* case is of no aid to petitioners. There this Court held that where several counts of an indictment each charge a conspiracy to violate a different statute and the evidence shows only a single conspiracy, a conviction on the several counts will not sustain a sentence exceeding two years' imprisonment, the

---

between Daniel and Walter which is revealed by the evidence outlined in the Statement makes it abundantly clear that the jury was entitled to conclude that the two were in a conspiracy which endured during the period covered by the conspiracy count. As we have indicated (*supra*, pp. 9–10), no question of the statute of limitations is involved. There is no basis in the present record for any claim that Daniel withdrew from the conspiracy prior to the offenses which Walter directly committed. Withdrawal from a conspiracy must be evidenced by affirmative action (*Hyde* v. *United States*, 225 U. S. 347, 369). There is no such evidence.

maximum penalty for a single violation of the conspiracy statute (*supra*, p. 4). This ruling is founded upon the proposition that the conspiracy statute is aimed at punishing the agreement which constitutes the conspiracy, so that if there is but one agreement, albeit the agreement contemplates the commission of several offenses, there is only one offense. "The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one." 317 U. S. at 53. But in *Braverman's* case the prosecution was solely for conspiracy. The indictment did not charge any substantive offenses committed pursuant to the conspiracy. In the instant case, petitioners were charged with, tried for, and convicted of (1) a single conspiracy to commit several offenses, and (2) the commission of some of the substantive offenses alleged as an object of the conspiracy. The situations are obviously not parallel.

I

A CONSPIRACY TO COMMIT A CRIME AND THE CRIME COMMITTED PURSUANT TO THE CONSPIRACY ARE DISTINCT OFFENSES AND, HENCE, SEPARATELY PUNISHABLE. NEITHER OFFENSE MERGES INTO THE OTHER.

From *United States* v. *Hirsch*, 100 U. S. 33, to *Braverman* v. *United States*, 317 U. S. 49, *supra*, this Court has recognized on numerous occasions and in varying situations that a conspiracy to commit a crime is an offense entirely distinct and separate from the crime which is

the object of the conspiracy. These decisions, if they do not directly hold that the two offenses may be tried and punished as independent offenses, make that answer inevitable.

In the *Hirsch* case, the Court held that a conspiracy to defraud the United States of duties was not an offense arising under the revenue laws so as to be governed by the period of limitations provided for in respect of offenses arising under those laws.[18]

In *Clune* v. *United States*, 159 U. S. 590, plaintiff in error, who had been convicted of conspiring to commit the offense of obstructing the passage of the United States mails, contended that a conspiracy to commit an offense cannot be punished more severely than the offense itself. In rejecting the contention, this Court said (p. 595):

> A conspiracy to commit an offense is denounced as itself a separate offense, and the punishment therefor fixed by the statute, and we know of no lack of power in Congress to thus deal with a conspiracy. Whatever may be thought of the wisdom or propriety of a statute making a conspiracy to do an act punishable more severely than the doing of the act itself, it is a matter to be considered solely by the legislative body. *Callan* v. *Wilson*, 127 U. S. 540, 555. The power exists to separate the conspiracy from the act itself

[18] See also *Rabinowich* case, p. 29 *infra*.

and to affix distinct and independent penalties to each."

A decision closely in point, if not dispositive in principle, is *Carter* v. *McClaughry*, 183 U. S. 365, 390–395. There the contention was that Carter had been placed twice in jeopardy upon conviction by a court martial of conspiracy to defraud the United States and also of causing false and fraudulent claims to be made against the United States upon the ground that the sentence imposed upon him was greater than the court martial could inflict on conviction of either of the offenses charged, taken singly. This Court rejected the contention because of the distinctiveness of the offenses and said that "The fact that both charges related to and grew out of one transaction made no difference." (183 U. S. at 394–395).

In *Heike* v. *United States*, 227 U. S. 131, petitioner was indicted for frauds on the revenue and in a separate count for conspiracy to commit such frauds. He was convicted on the conspiracy count. He urged in this Court that if the evidence proved him guilty of a conspiracy it proved him guilty of the substantive offense. But the Court said (p. 144):

> * * * the liability for conspiracy is not taken away by its success—that is, by the accomplishment of the substantive offence at which the conspiracy aims. *Brown* v.

[19] See also *United States* v. *Stevenson* (*No. 2*), 215 U. S. 201, 203.

Elliott, 225 U. S. 392. *Reg.* v. *Button*, 11 Q. B. 929. *Rex* v. *Sprägg*, 2 Burr. 993, 999.

In the leading case of *United States* v. *Rabinowich*, 238 U. S. 78, the Court held that a conspiracy to commit an offense denounced by the Bankruptcy Act was not an offense arising under that Act so as to be governed by the period of limitations specified by the Act for offenses arising under it.[20] In reviewing the earlier decisions, the Court said (pp. 85–86):

> It is apparent from a reading of § 37, Crim. Code (§ 5440, Rev. Stat.), and has been repeatedly declared in decisions of this court that a conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy. *Callan* v. *Wilson*, 127 U. S. 540, 555; *Clune* v. *United States*, 159 U. S. 590, 595; *Williamson* v. *United States*, 207 U. S. 425, 447; *United States* v. *Stevenson (No. 2)*, 215 U. S. 200, 203. And see *Burton* v. *United States*, 202 U. S. 344, 377; *Morgan* v. *Devine*, 237 U. S. 632. The conspiracy, however fully formed, may fail of its object, however earnestly pursued; the contemplated crime may never be consummated; yet the conspiracy is none the less punishable. *Williamson* v. *United States*, *supra*. And it is punishable as conspiracy, though the intended crime be accomplished. *Heike* v. *United States*, 227 U. S. 131, 144.

In respect of the argument that it was incon-

[20] See also *United States* v. *McElvain*, 272 U. S. 633, 638.

sistent with the policy of the Bankruptcy Act to allow a larger period for the prosecution of a conspiracy to violate one of its penal clauses than for the violation itself, the Court pointed out (238 U. S. at 88):

> For two or more to conferedate and combine together to commit or cause to be committed a breach of the criminal laws, is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered.

In the *Braverman* case, which we have discussed at *supra*, pp. 25–26, it was said (317 U.S. at 54):

> A conspiracy is not the commission of the crime which it contemplates, and neither violates nor "arises under" the statute whose violation is its object.[21]

It is therefore quite manifest that under federal law the conspiracy and the objective offense are

[21] Upon the same postulate, that it is the unlawful agreement to offend against the penal laws of the United States at which the conspiracy statute is directed, this Court has decided that a single count for conspiracy to commit two offenses is not bad for duplicity (*Frohwerk* v. *United States*, 249 U. S. 204, 209–210; *Ford* v. *United States*, 273 U. S.

as distinct as robbery and arson. Hence, it follows that each inevitably carries its own penal sanction, which may be imposed without regard to the punishment administered for the other, leaving no room for merger of one with the other. See *Banghart* v. *United States*, 148 F. 2d 521 (C. C. A. 4), certiorari denied, 325 U. S. 887;[22]

593, 602); that the conspiracy must be sufficiently charged and cannot be aided by averments of acts done by one or more of the conspirators in furtherance of the objects of the conspiracy (*United States* v. *Britton*, 108 U. S. 199, 205; *Pettibone* v. *United States*, 148 U. S. 197, 203; *Pierce* v. *United States*, 252 U. S. 239, 244); that in an indictment for conspiracy the same degree of detail is not required in stating the object of the conspiracy as if the indictment were one charging the substantive offense (*Williamson* v. *United States*, 207 U. S. 425, 447–448; *Crawford* v. *United States*, 212 U. S. 183, 191–192; *Joplin Mercantile Co.* v. *United States*, 236 U. S. 531, 548–549; *Frohwerk* v. *United States*, 249 U. S. 204, 209; *Thornton* v. *United States*, 271 U. S. 414, 423; *Wong Tai* v. *United States*, 273 U. S. 77, 81; *Glasser* v. *United States*, 315 U. S. 60, 66); that a person may be guilty of conspiring although incapable of committing the objective offense (*Williamson* v. *United States*, 207 U. S. 425; *United States* v. *Holte*, 236 U. S. 140; see also *Gebardi* v. *United States*, 287 U. S. 112).

[22] In the *Banghart* case the overt act to support the conspiracy count was the same act charged as the basis for one of the substantive counts. See Memorandum in Opposition, p. 4, No. 1212, October Term, 1944. *Freeman* v. *United States*, 146 F. 2d 978 (C. C. A. 6), which held that only one punishment could be imposed for the substantive offense and a conspiracy to commit the offense is, as we pointed out in our Memorandum in Opposition in the *Banghart* case (p. 6), an isolated and clearly erroneous decision. The Sixth Circuit relied upon its analogous decision in *French* v. *United States*, 42 F. 2d 51, which is criticised in *United States* v. *Werler*, 79 F. 2d 526, 528 (C. C. A. 2), certiorari denied, 297 U. S. 703.

United States v. *Wexler*, 79 F. 2d 526, 527–528 (C. C. A. 2), certiorari denied, 297 U. S. 703; *Morgan* v. *Aderhold*, 73 F. 2d 171, 173 (C. C. A. 5); *Parmagini* v. *United States*, 42 F. 2d 721, 725 (C. C. A. 9); *Sneed* v. *United States*, 298 Fed. 911, 913 (C. C. A. 5), certiorari denied, 265 U. S. 590; see also *Morgan* v. *Devine*, 237 U. S. 632.[23]

Until petitioners made the point, no one, so far as we have discovered, has ever urged that the objective offense when committed merged into the conspiracy. It is true that at common law the doctrine of merger was recognized in conspiracy law where the completed offense was a felony. But then a conspiracy to commit a crime was only a misdemeanor. A conspiracy to commit a misdemeanor did not merge when the misdemeanor was committed. The "so-called" doctrine of merger rested on several reasons: there was a forfeiture of property to the King on conviction of a felony; persons indicted for a misdemeanor had certain advantages at the trial—such as the right to make a full defense by counsel, to have a copy of the indictment, and to have a special jury—privileges not accorded to a person indicted for a felony. The reasons for the rule

[23] It may be noted that in *Morgan* v. *Devine*, where the Court upheld consecutive sentences for the offense of breaking into a post office and the offense of stealing property belonging to the Post Office Department, it cited *Carter* v. *McClaughry*, 183 U. S. 365 (*supra*, p. 28) as authority for the holding. See 237 U. S. at 641.

do not, of course, currently exist, and the doctrine has now been generally rejected.[24]

And, whatever vestiges may yet remain, the merger doctrine clearly has no application in federal conspiracy law. The conspiracy statute makes the crime it denounces a felony, and this is so even though the conspiracy be one to commit a misdemeanor. Additionally, any application of a merger doctrine would thwart the manifest congressional purpose of permitting punishment not only of the objective offense but of the conspiracy. As the decisions point out, the aim of the conspiracy statute is to punish the evil of confederating and combining together, irrespective of whether the conspiracy succeeds in its criminal purpose. The combined plotting is often a more serious evil than the commission of the contemplated crime itself, with the result that it may be punished more severely than the objective offense. Frequently, too, it would be difficult to convict of the substantive offense men who conceive the crime and then delegate its commission to others.

In only two types of cases, so far as we are aware, has it been held that it would be against the congressional policy to permit prosecutions

[24] See the annotations to *Sneed* v. *United States*, *supra*, in 37 A. L. R. 778 and to *People* v. *Tavormina*, 257 N. Y. 84 (1931) in 75 A. L. R. 1405.

both for the agreement and the substantive offense: (1) in the *concursus necessarius* cases, where the commission of the substantive offense necessarily requires joint action[25] and (2) where the substantive statute excludes punishment for one who does no more than voluntarily participate in the crime of another.[26] In these cases the substantive offense only may be punished.

While there is no basis in law for an assault on the inclusion of conspiracy and substantive counts

---

[25] See *United States* v. *Katz*, 271 U. S. 354, 355; *United States* v. *Zeuli*, 137 F. 2d 845, 846 (C. C. A. 2); *United States* v. *Sager*, 49 F. 2d 725, 727 (C. C. A. 2); *Norris* v. *United States*, 34 F. 2d 839, 841 (C. C. A. 3), reversed on other grounds, 281 U. S. 619; *United States* v. *N. Y. C. & H. R. R. Co.*, 146 Fed. 298, 303 (C. C. S. D. N. Y.); *United States* v. *Dietrich*, 126 Fed. 664, 667 (C. C. D. Neb.). If there is any basis in law for the doubt expressed in some mail fraud cases as to whether a prosecution may lie both for the conspiracy and any substantive offense committed pursuant to it, where the schemers, the conspirators, the overt acts, and the substantive offenses are the same (see *Brady* v. *United States*, 24 F. 2d 399, 404–405) (C. C. A. 8) and decisions cited; but cf. *United States* v. *Wexler*, 79 F. 2d 526 (C. C. A. 2), certiorari denied, 279 U. S. 703, and *Banghart* v. *United States*, 148 F. 2d 521 (C. C. A. 4), certiorari denied, 325 U. S. 887), the process of rationalization is somewhat assimilable to that utilized in the *concursus necessarius* cases.

[26] See *Gebardi* v. *United States*, 287 U. S. 112, where it was held to be against the policy of Congress as expressed in the Mann Act to prosecute for conspiracy the woman and the man who transports her even though the woman was willing to be transported for the immoral purpose.

in an appropriate case, we are aware that the courts have from time to time criticised the addition of a conspiracy count in cases where the facts show merely the joint commission of a substantive offense without evidence of a preconcert of plan. See for instance, recommendations of the senior circuit judges at their annual conference in June 1925, embodied in the Annual Report of the Attorney General for the Fiscal Year 1925, pp. 5–6.[27] The criticism has invariably however, been aimed at adding the conspiracy count rather than, as here, the substantive counts. But in this case no serious attack was made in the circuit court of appeals against the inclusion of the conspiracy count, and the compliant here has significance only insofar as Daniel is concerned and then primarily in the lim-

[27] This is the complaint to which the remarks of Judge Dickinson, in *Weiss* v. *United States*, 103 F. 2d 759 (C. C. A. 8), quoted by petitioners, are addressed. When he states that "it is easy to distinguish them [the conspiracy and the objective offense] as two different offenses and yet the truth is that the conspiracy is merged in the substantive crime upon its commission," it is obvious that he is not speaking in any legalistic sense but in the sense that every crime committed jointly involves the element of conspiracy and should be punished merely as a substantive crime and not as a conspiracy in the absence of preconcerted plan. This would seem to be also the tenor of the remarks of Judge Denison in *Laughter* v. *United States*, 259 Fed. 94, 99 (C. C. A. 6), certiorari denied, 249 U. S. 613, cited by petitioners, if they may be regarded as criticism.

ited sense that it is made in the attempt to avoid liability on the substantive counts. However, even if there had been no charge of conspiracy in the indictment, Daniel could be held on the substantive counts on the principle of causation because of his conspiratorial activity, as we later point out (*infra*, pp. 37–51). So far as the substantive counts are concerned, they were added apparently because the United States Attorney became aware, when he learned of the *Braverman* decision, that there was available a six-year statute of limitations relating to various types of internal revenue crimes (see footnote 5, *supra*, p. 10). In any event, so far as Walter is concerned, the evidence adduced directly implicated him in most of the substantive crimes charged, and so far as Daniel was charged substantively with the crimes in which Walter was the principal participant, the United States Attorney proceeded on the well-recognized principle of causation adverted to. If there was any abuse here it would only be in that the United States Attorney was wrong in his application of that settled principle to Daniel's

case and thus should not have charged him substantively. Hence, it is evident that the criticism levelled against the tacking on of a conspiracy count for what is purely joint substantive criminal activity without preconcerted plan is without relevance in this case; the conspiracy endured for several years and a number of offenses were committed pursuant to it.

II

A conspirator is responsible for criminal acts committed pursuant to the conspiracy or as a natural consequence of the conspiracy, so long as he was a party to the conspiracy when the criminal acts were committed

We have stated, *supra*, p. 23, that in respect of Daniel's conviction on substantive counts 3, 5, 6, 8, and 9, there is no evidence to show that he participated directly in the commission of the offenses charged in those counts. The evidence adduced at the trial (*supra*, pp. 14–15) shows that the direct actor in those offenses was Walter. Since the validity of Daniel's sentence on the substantive counts rests entirely on his guilt of the offenses charged in the counts mentioned, the ques-

tion is whether his conviction on those counts is supportable.[28]

Daniel's guilt on the substantive counts was submitted to the jury on the theory that if they found that at the time the substantive offenses were committed petitioners were in an unlawful conspiracy and that the substantive offenses charged were committed in furtherance of the conspiracy or its objects, each petitioner could be found guilty of the substantive offenses.[29] The circuit court of appeals appears to have approved this theory of guilt, stating (R. 244):

> In deciding the guilt or innocence of the defendants on the several counts charging substantive offenses, the jury could weigh all the foregoing circumstances [the evidence tending to show a conspiracy] in

[28] The remaining substantive count as to which Daniel was convicted, count 10, cannot be utilized to support his sentence because, as the court below held (R. 243; *supra*, pp. 8–9), the offense there charged was barred by the statute of limitations.

While there is no evidence to show that Walter participated directly in the commission of the offenses charged in substantive counts 2 and 4 (see *supra*, pp. 13–14), as to which he was convicted, his sentence on the sul stantive counts is supported by his convictions of the offenses charged in counts 3, 5, 6, 8, and 9, in which he was the direct actor. Since his sentence on the substantive counts was a general one, it is supported by his conviction on those counts, even if his conviction on counts 2 and 4 may not be sustained (see *supra*, pp. 10–11, footnote 6).

[29] The trial judge had previously told the jury in respect of substantive counts 2 to 9, inclusive, that the Government was required to prove their commission "by the defendants, or by one of them" (R. 190).

determining whether these two appellants were in fact in a conspiracy in the acts that constitute the violations in the manner and form set out in the counts charging substantive offenses, and this would be true if there had been no conspiracy count in the indictment.

"Although conspiracy be not charged, if it be shown by the evidence to exist, the act of one or more defendants in furtherance of the common plan is in law the act of all." *Davis* v. *United States*, 12 Fed. (2d) 253.[30]

Daniel asserts (Br. 8, 9, 22–23) that this theory of his guilt of the substantive offenses is unsound.[31] We submit that the theory is sound—that a conspirator is responsible for criminal acts committed pursuant to the conspiracy or as a natural consequence of the conspiracy, so long as he was a party to the conspiracy at the time the criminal acts were committed. We further submit that on this basis the trial judge's instruction to the jury furnished them with a proper standard for ascertaining Daniel's guilt of the substantive offenses here involved.

The cases are legion where a party to a conspiracy to commit a crime has been held criminally responsible for the commission by another of the

[30] See *St. Clair* v. *United States*, 154 U. S. 134, 149.

[31] He states (Br. 8): "A person may not be convicted of an alleged substantive offense, when he was not the principal actor in the offense, nor participated therein, merely because it might be shown that he was a member of a conspiracy to commit these acts."

objective offense or of an offense which is the natural consequence of the conspiracy if he was a party to the conspiracy at the time of the commission of the offense. His responsibility rests not upon any principle peculiar to the law of criminal conspiracy as such, but upon the rule, which no one doubts, that a person who counsels, procures, or commands [32] another to commit a crime is himself also guilty of the crime [33] because

---

[32] Cf. *Hyde* v. *United States*, 225 U. S. 347, 368, involving a conspiracy between an employer and his employee.

[33] In this aspect the principle is embodied in the aider and abettor statute (sec. 332 of the Criminal Code, 18 U. S. C. 550), which provides:

"Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

The trial judge charged, however, in terms of the principle. The case as to Daniel might have been submitted to the jury under the aider and abettor statute on the narrower basis, expressed in *Cardinal* v. *United States*, 50 F. 2d 166, 170 (C. C. A. 8), that "* * * one cannot knowingly permit his premises to be used for an unlawful purpose, thereby contributing to the success of the enterprise in a very substantial way, without becoming a party thereto, unless, within a reasonable time after becoming aware of the unlawful use, dependent upon the circumstances of the individual case, he takes steps reasonably calculated to terminate that unlawful use." Daniel was the owner of the farm, he was closely associated with Walter in Walter's bootlegging activities, and obviously knew what Walter was doing. In permitting his property thus to be used by Walter, Daniel could have been convicted for aiding and abetting Walter as to those offenses committed on the farm property (counts 3, 5, and 9, *supra*, pp. 14, 15). It was, of course unnecessary that he be specifically indicted as an aider and abettor (*Melling* v. *United*

natural reason and elementary principles of causation so demand.[34]

An example is *Boyd* v. *United States*, 142 U. S. 450, where the trial court in a case charging the defendants jointly with murder told the jury (pp. 455–456):

> If a number of men agree to do an act which, from its nature or the way it is to be done, is an act that will put human life in jeopardy, then the putting of human life in jeopardy, or the destruction of human life, is a necessary and a natural and a probable consequence of the act agreed to be done by the party, * * * it is but equal and exact justice that all who enter upon an enterprise of that kind should be responsible for the death of an innocent person that transpires because of the execution of the enterprise then entered upon, and because that enterprise is one that would naturally and reasonably produce that result. * * * when a number of persons agree to and enter upon the com-

States, 25 F. 2d 92 (C. C. A. 7); *O'Brien* v. *United States*, 25 F. 2d 90, 91 (C. C. A. 7)). But Daniel's case was submitted to the jury and his conviction affirmed not on this narrow basis but upon the broader principle of liability of a conspirator for substantive offenses committed by a coconspirator in carrying out the unlawful enterprise.

[34] See Sayre, *Criminal Responsibility for the Acts of Another*, 43 Harv. L. Rev. 689, 695 (1930): "From the beginning there has never been the slightest doubt that one who commands, counsels or procures another to commit a crime is himself guilty of the crime. In such a case there is no difficulty of causation or of liability without fault."

> mission of the crime of robbery, and a person is killed, who is an innocent person, in the execution of that purpose to rob, all the parties who have so entered into the agreement and enter upon the execution of the purpose to rob are equally responsible. The pistol or gun fired is the pistol or gun of each and every one of them.

As to these instructions, this Court said (p. 456):

> These principles, of the soundness of which we entertain no doubt, were enforced by the court in its charge by numerous illustrations drawn from adjudged cases and text-writers of high authority.[35]

In several cases involving prosecutions for substantive offenses committed by a defendant pursuant to a conspiracy, this Court has ruled that an element of the offense, such as motive or intent, might be proved by declarations or acts of the defendant's co-conspirators. See *Wiborg* v.

---

[35] The convictions of the defendants were reversed because of other erroneous instructions.

Other cases embodying the same principle are: *People* v. *Bringhurst*, 192 Cal. 748, 751 (1923); *People* v. *Rabbr*, 168 Cal. 316, 318 (1914); *People* v. *Lawrence*, 143 Cal. 148 (1904); *People* v. *Vasquez*, 49 Cal. 560 (1875); *Butler* v. *People*, 125 Ill. 641, 645 (1888); *Spies* v. *People*, 122 Ill. 1, 177–178, 225, 226 (1887); *Hanna* v. *People*, 86 Ill. 243, 245 (1877); *State* v. *Furney*, 41 Kan. 115, 121 (1889); *People* v. *Foley*, 59 Mich. 553, 556 (1886); *Odom* v. *State*, 172 Miss. 687 (1935); *Romero* v. *State*, 101 Neb. 650, 652 (1917); *People* v. *Michalow*, 229 N. Y. 325, 330–331 (1920); *State* v. *Heyward*, 2 Nott & McCord (S. C.) 312, 319–320 (1820); *Cooper* v. *State*, 69 Tex. Cr. Rep. 405, 407 (1913).

United States, 163 U. S. 632, 657–658; *American Fur Co.* v. *United States*, 2 Pet. 358, 362; see also *Brown* v. *United States*, 150 U. S. 93; *St. Clair* v. *United States*, 154 U. S. 134–149; *United States* v. *Gooding*, 12 Wheat. 460, 469. Cf. *Conn. Mut. Life Ins. Co.* v. *Hillmon*, 188 U. S. 208, 218–219; *Nudd* v. *Burrows*, 91 U. S. 426, 438.

Furthermore, it is immaterial that the conspirator was not present when the crime was committed. See *People* v. *Pierce*, 387 Ill. 608, 613 (1944); *People* v. *Payne*, 359 Ill. 246, 254 (1935); *Spies* v. *People*, 122 Ill. 1, 253 (1887); *People* v. *Michalow*, 229 N. Y. 325, 330–331 (1920); *State* v. *Heyward*, 2 Nott & McCord (S. C.) 312, 319–320 (1820); *Cooper* v. *State*, Tex. Cr. Rep. 405, 407 (1913); see also the mail fraud cases cited, *infra*, footnote 36, [redacted].

Illustrative of the doctrine that conspirators may be responsible for a substantive offense committed by one of them in furtherance of the conspiracy are numerous mail fraud cases. Here it is uniformly held that if there is a joint enterprise to violate the mail fraud statute (18 U. S. C. 338), all parties to the enterprise at the time the mailing occurred are responsible for the mailing;[36] and this is so, even though the prosecution

[36] See *Kann* v. *United States*, 140 F. 2d 380, 382 (C. C. A. 4), reversed on other grounds, 323 U. S. 88; *Blue* v. *United States*, 138 F. 2d 351, 359 (C. C. A. 6), certiorari denied, 322 U. S. 736–737; *Baker* v. *United States*, 115 F. 2d 533, 540 (C. C. A. 8), certiorari denied, 312 U. S. 692; *Hart* v. *United States*, 112 F. 2d 128, 131 (C. C. A. 5); *Mackett* v. *United States* 90 F. 2d 462 (C. C. A. 7); *Cochran* v. *United States*,

is not brought under the conspiracy statute.[37] The same principle has been utilized in prosecutions for sending non-mailable matter through the mails, with the result that where the evidence shows a joint enterprise contemplating the use of the mails, all parties thereto can be charged with the mailing. *Burton* v. *United States*, 142 Fed. 57, 62 (C. C. A. 8). And the principle has been employed in a case charging a conspiracy to violate the federal prohibition act and the substantive offenses of carrying on the business of a distiller contrary to law, fermenting mash for the distillation of spirits, and maintaining a common nuisance. *Johnson* v. *United States*, 62 F. 2d 32 (C. C. A. 9). In upholding appellants' convictions on the substantive counts as against their contention that they were not present at the place where and the time when the liquor was manufactured, the court said (p. 34):

> The evidence shows that the parties were associated together for the illegal purpose of manufacturing intoxicating liquor, and any act done by one or more of the parties

---

41 F. 2d 193, 199–200 (C. C. A. 8); *Tincher* v. *United States*, 11 F. 2d 18, 21 (C. C. A. 4); certiorari denied, 271 U. S. 664; *Ader* v. *United States*, 284 Fed. 13, 25 (C. C. A. 7), certiorari denied, 260 U. S. 746; *Preeman* v. *United States*, 244 Fed. 1, 18 (C. C. A. 7), certiorari denied, 245 U. S. 654; *Chambers* v. *United States*, 237 Fed. 513, 524–525 (C. C. A. 8).

[37] See *Cochran* v. *United States*, 41 F. 2d 193, 199–200 (C. C. A. 8); *Ader* v. *United States*, 284 Fed. 13, 25 (C. C. A. 7), certiorari denied, 260 U. S. 746; *Preeman* v. *United States*, 244 Fed. 1, 18 (C. C. A. 7), certiorari denied, 245 U. S. 654.

to accomplish that purpose was the act of all.

We, of course, recognize that the doctrine cannot be extended to fasten liability for the commission of the substantive offense upon one who joins the conspiracy after the commission of the offense. An individual's ratification of another's criminal act cannot form the basis of criminal liability. He must be criminally liable, if at all, at the time when the crime takes place. See *United States v. Fox*, 95 U. S. 670, 671: "The criminal intent essential to the commission of a public offence must exist when the act complained of is done: it cannot be imputed to a party from a subsequent independent transaction." See also, Sayre, *Criminal Responsibility for the Acts of Another*, 43 Harv. L. Rev. 689, 708 (1930); Bishop, *Criminal Law* (9th ed). vol. 1, p. 466. On the other hand, in the case where a substantive offense is committed pursuant to the conspiracy by one of the conspirators, those who were then associated with him may be held responsible because their bringing about the crime resulted in a concurrence of act and criminal intent on their part. No different principle is involved even in conspiracy prosecutions by the application of the doctrine that one who joins a conspiracy after its inception is bound by the acts and declarations of his co-conspirators notwithstanding they occur prior to his association with the conspiracy. The guilt as a

conspirator of the later participant does not flow from the fact that the earlier participants may have committed criminal acts, since the gist of the offense is the agreement to commit a crime and not the crime itself; the later participant becomes criminally responsible because, with the requisite knowledge and intent, he associates himself with an existing combination to commit crime (*United States* v. *Falcone*, 311 U. S. 205; see also, *Direct Sales Co.* v. *United States*, 319 U. S. 703); the prior acts and declarations are utilized to establish the illegal character of the combination. *Hitchman Coal and Coke Co.* v. *Mitchell*, 245 U. S. 229, 249.

The only decision we have found which fails to hold a conspirator for substantive offenses committed pursuant to the conspiracy is *United States* v. *Sall*, 116 F. 2d 745 (C. C. A. 3). We believe that analysis of the decision will demonstrate its unsoundness. There Sall had been convicted upon eight counts of an indictment which charged him and others in the first count with conspiring to violate the internal revenue laws, viz., carrying on the business of distillers with intent to defraud the Government of the tax imposed thereon; possessing an unregistered still, making mash fit for distillation in an unauthorized building; removing and aiding in removing distilled spirits to a building which was not a bonded warehouse; and concealing and aiding in the concealment of untaxed distilled spirits; the other counts charged substan-

tive violations of the internal revenue laws, three, including count 7, charging that the defendants concealed and were concerned in the concealment of alcohol with intent to defraud the Government of the tax imposed thereon. The conviction was affirmed except as to count 7. The conviction on this count was reversed because the court concluded that the evidence was insufficient to show that Sall participated in the offense, although it is clear from its statement that it deemed the concealments as having been committed pursuant to the conspiracy (p. 747). The Government contended that on the basis of Sall's participation in the conspiracy, he was liable under the aider and abettor statute (footnote 33, *supra*, p. 40) for "any and all crimes thereafter committed in the course of the ramifications of the enterprise, quite apart from personal participation in or even knowledge of the precise details" (116 F. 2d at 747).

Circuit Judge Maris, writing for the court, said (pp. 747–748):

> It was not sufficient merely to prove that [Sall] was a member of the conspiracy to manufacture illicit alcohol and that in the course of that conspiracy those particular crimes were committed by other conspirators. * * *
>
> Here the government seeks to charge one of the conspirators with a substantive offense—concealment of alcohol. Although that offense may in fact have been committed in the course of the conspiracy it is

still necessary to prove that the defendant, even though he had joined the conspiracy, had also joined, at least to the extent which we have indicated,[38] in the concealment of alcohol which constituted the substantive offense with which he is charged. It is the act of concealment with criminal intent, and not the previous agreement, which is the gist of that offense. To hold otherwise would be to ignore the difference in character between the crime of conspiracy and the substantive crimes which may result from it and to enable the government through the use of the conspiracy dragnet to convict a conspirator of every substantive offense committed by any other member of the group even though he had no part in it or even knowledge of it. To permit this would open the way for the conviction of a conspirator more than once for the same conspiracy, the substantive counts being, if the government's theory is accepted, in fact merely additional conspiracy counts each alleging one overt act. Where as here but one conspiracy has been shown a defendant may not thus be convicted twice of having joined it for that would be to place him twice in jeopardy for the same offense.[39]

---

[38] I. e., "he did with intent to derfaud the revenues aid, abet, counsel, command, induce or procure the removal, deposit or concealment of the particular untaxpaid alcohol referred to in the three counts" (116 F. 2d at 747).

[39] The evidence as to the other challenged substantive counts was found adequate.

We do not, of course, espouse the Government's view in the *Sall* case that a conspirator is responsible for any and all crimes committed in the course of the ramifications of a conspiracy, but the basis of Judge Maris' decision is a different one, i. e., that a conspirator is not liable for a substantive crime committed by a fellow conspirator unless he directly participates in or has knowledge of it even though, as in the case before him, the substantive crime is committed pursuant to the conspiracy. Judge Maris wholly overlooks the rationale which binds one conspirator for a substantive offense of his co-conspirators committed in furtherance of the conspiracy. The non-actor in the commission of the substantive offense is not being punished twice for conspiracy, nor is he being punished for a crime as to which he had no criminal intent, as Judge Maris suggests. The conspiracy to commit the crime is one offense, and, if an overt act is committed to further it, not necessarily the crime contemplated, the parties to the conspiracy are punishable for the agreement, whether or not a substantive crime has been committed. On the other hand, if one of the parties actually commits a crime pursuant to the agreement, all parties to the conspiracy are responsible therefor, because each of them instigated the commission of the crime; the crime might never have been committed but for the conspiracy. The crime is the result of action in which each party acquiesced

or which he should have foreseen might be taken. The conspirator is not held merely because of his agreement, but because he did something which led to the commission of the crime. We see nothing novel or unjust in requiring the conspirator to pay for the crime which he caused to be committed. Judge Maris does not deny that a conspirator may be held for an overt act which he does not commit but which cements his conspiratorial liability. The conspirator can always avoid liability by effectively withdrawing from the conspiracy before the crime is committed. (Cf. *United States* v. *Socony Vacuum Oil Co.*, 310 U. S. 150, 253). Why should any different rule be applied as to substantive offense which is committed in furtherance of the partnership in crime?

We thus come to the final issue in the case, namely, whether the trial judge's instruction told the jury that Daniel could be found guilty of the substantive offenses in question if they found that the offenses were committed in furtherance of a conspiracy to commit them to which he was a party at the time or if they found that they were a natural consequence of the conspiracy. As we have stated, *supra*, p. 16, the judge told the jury "if you are satisfied from the evidence beyond a reasonable doubt that at the time these particular substantive offenses were committed * * * that the two defendants were in an unlawful conspiracy, as I have heretofore defined unlawful

conspiracy to you, then you would have a right * * * to convict each of these defendants on all these substantive counts, provided the acts referred to in the substantive counts were acts in furtherance of the unlawful conspiracy or object of the unlawful conspiracy, which you have found from the evidence existed." (See R. 191–192.)

The only objects of the conspiracy which were not withdrawn from the jury's consideration were that petitioners conspired to possess whiskey in untax-paid containers, that they conspired to remove, deposit, or conceal whiskey with intent to defraud the Government of the tax imposed thereon, and perhaps, on the basis of Walter's sales, that they conspired that Walter should carry on the business of a retail liquor dealer without having paid the required tax (see *supra*, p. 17). The only substantive offenses with which we are concerned are those relating to the removal, deposit, or concealment of whiskey by Walter with intent to defraud the Government of the tax imposed thereon. It can hardly be said that the commission of this type of offense was not in furtherance of or a natural consequence of the conspiracy which the jury had before it. Even if we assume, at the worst, that the jury found only a conspiracy to carry on the business of a retail liquor dealer without paying the required tax, it is entirely reasonable that concealing whiskey with intent to defraud the

Government of the tax imposed thereon would be a natural outgrowth of that conspiracy. On the other hand, if, as is more likely on the basis of the evidence, the jury found that the conspiracy included all three objects, there can be no doubt that the substantive offenses were in furtherance of or natural consequences of the conspiracy.

We conclude, therefore, that Daniel's conviction on the substantive counts here involved was proper, and that petitioners' sentences on the substantive counts of which they stand convicted are not excessive.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
W. MARVIN SMITH,
Special Assistant to the Attorney General.
ROBERT S. ERDAHL,
LEON ULMAN,
Attorneys.

APRIL 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946

dissent p. 2.

SUPREME COURT OF THE UNITED STATES.

No. 719. October Term, 1945.

W. Daniel Pinkerton and Walter G. Pinkerton, Petitioners, vs. The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[June 10, 1946.]

Mr. Justice Douglas delivered the opinion of the Court.

Walter and Daniel Pinkerton are brothers who live a short distance from each other on Daniel's farm. They were indicted for violations of the Internal Revenue Code. The indictment contained ten substantive counts and one conspiracy count. The jury found Walter guilty on nine of the substantive counts and on the conspiracy count. It found Daniel guilty on six of the substantive counts and on the conspiracy count. Walter was fined $500 and sentenced generally on the substantive counts to imprisonment for thirty months. On the conspiracy count he was given a two year sentence to run concurrently with the other sentence. Daniel was fined $1,000 and sentenced generally on the substantive counts to imprisonment for thirty months. On the conspiracy count he was fined $500 and given a two year sentence to run concurrently with the other sentence. The judgments of conviction were affirmed by the Circuit Court of Appeals.[1] 151

[1] The court held that two of the counts under which Walter was convicted and one of the counts under which Daniel was convicted were barred by the statute of limitations and that as to them the demurrer should have been sustained. But each of the remaining substantive counts on which the jury had returned a verdict of guilty carried a maximum penalty of three years' imprisonment and a fine of $5,000. Int. Rev. Code, § 3321, 26 U. S. C. § 3321. Hence the general sentence of fine and imprisonment imposed on each under the substantive counts was valid. It is settled law, as stated in Claassen v. United States, 142 U. S. 140, 146-147, "that in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment, because, in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only."

The same rule obtains in the case of concurrent sentences. Hirabayashi v. United States, 320 U. S. 81, 85 and cases cited.

F. 2d 499. The case is here on a petition for a writ of certiorari which we granted, because one of the questions presented involved a conflict between the decision below and *United States* v. *Sall*, 116 F. 2d 745, decided by the Circuit Court of Appeals for the Third Circuit.

A single conspiracy was charged and proved. Some of the overt acts charged in the conspiracy count were the same acts charged in the substantive counts. Each of the substantive offenses found was committed pursuant to the conspiracy. Petitioners therefore contend that the substantive counts became merged in the conspiracy count, and that only a single sentence not exceeding the maximum two-year penalty provided by the conspiracy statute (Criminal Code § 37, 18 U. S. C. § 88) could be imposed. Or to state the matter differently, they contend that each of the substantive counts became a separate conspiracy count but since only a single conspiracy was charged and proved, only a single sentence for conspiracy could be imposed. They rely on *Braverman* v. *United States*, 317 U. S. 49.

In the *Braverman* case the indictment charged no substantive offense. Each of the several counts charged a conspiracy to violate a different statute. But only one conspiracy was proved. We held that a single conspiracy, charged under the general conspiracy statute, however diverse its objects may be, violates but a single statute and no penalty greater than the maximum provided for one conspiracy may be imposed. That case is not apposite here. For the offenses charged and proved were not only a conspiracy but substantive offenses as well.

Nor can we accept the proposition that the substantive offenses were merged in the conspiracy. There are, of course, instances where a conspiracy charge may not be added to the substantive charge. One is where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime. See *United States* v. *Katz*, 271 U. S. 354, 355-356; *Gebardi* v. *United States*, 287 U. S. 112, 121-122. Another is where the definition of the substantive offense excludes from punishment for conspiracy one who voluntarily participates in another's crime.

Gebardi v. *United States*, *supra*. But those exceptions are of a limited character. The common law rule that the substantive offense, if a felony, was merged in the conspiracy,[2] has little vitality in this country.[3] It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. The power of Congress to separate the two and to affix to each a different penalty is well established. *Clune* v. *United States*, 159 U. S. 590, 594-595. A conviction for the conspiracy may be had though the substantive offense was completed. See *Heike* v. *United States*, 227 U. S. 131, 144. And the plea of double jeopardy is no defense to a conviction for both offenses. *Carter* v. *McClaughry*, 183 U. S. 365, 395. It is only an identity of offenses which is fatal. *See Gavieres* v. *United States*, 220 U. S. 338, 342. Cf. *Frieman* v. *United States*, 146 F. 2d 978. A conspiracy is a partnership in crime. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 253. It has ingredients, as well as implications, distinct from the completion of the unlawful project. As stated in *United States* v. *Rabinowich*, 238 U. S. 78, 88:

> "For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws, is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered."

And see *Sneed* v. *United States*, 298 Fed. 911, 912-913; *Banghart* v. *United States*, 148 F. 2d 521.

Moreover, it is not material that overt acts charged in the conspiracy counts were also charged and proved as substantive offenses. As stated in *Sneed* v. *United States*, *supra*, p. 913, "If the overt act be the offense which was the object of the conspiracy, and is also punished, there is not a double punishment of it."

[2] See May's Law of Crimes (4th ed. 1938) § 126; 17 Corn. L. Q. (1931) 136; People v. Tavorima, 257 N. Y. 84, 89-90.

[3] The cases are collected in 37 A. L. R. 778; 75 A. L. R. 1411.

The agreement to do an unlawful act is even then distinct from the doing of the act.[4]

It is contended that there was insufficient evidence to implicate Daniel in the conspiracy. But we think there was enough evidence for submission of the issue to the jury.

There is, however, no evidence to show that Daniel participated directly in the commission of the substantive offenses on which his conviction has been sustained,[5] although there was evidence to show that these substantive offenses were in fact committed by Walter in furtherance of the unlawful agreement or conspiracy existing between the brothers. The question was submitted to the jury on the theory that each petitioner could be found guilty of the substantive offenses, if it was found at the time those offenses were committed, petitioners were parties to an unlawful conspiracy and the substantive offenses charged were in fact committed in furtherance of it.[6]

---

[4] The addition of a conspiracy count may at times be abusive and unjust. The Conference of Senior Circuit Judges, reported in 1925:

"We note the prevalent use of conspiracy indictments for converting a joint misdemeanor into a felony; and we express our conviction that both for this purpose and for the purpose—or at least with the effect—of bringing in much improper evidence, the conspiracy statute is being much abused.

"Although in a particular case there may be no preconcert of plan, excepting that necessarily inherent in mere joint action, it is difficult to exclude that situation from the established definitions of conspiracy; yet the theory which permits us to call the aborted plan a greater offense than the completed crime supposes a serious and substantially continued group scheme for cooperative law breaking. We observe so many conspiracy prosecutions which do not have this substantial base that we fear the creation of a general impression, very harmful to law enforcement, that this method of prosecution is used arbitrarily and harshly. Further the rules of evidence in conspiracy cases make them most difficult to try without prejudice to an innocent defendant." Annual Report of the Attorney General for 1925, pp. 5-6.

But we do not find that practice reflected in this present case.

[5] This question does not arise as to Walter. He was the direct actor in some of the substantive offenses on which his conviction rests. So the general sentence and fine are supportable under any one of those. See note 1, *supra*.

[6] The trial court charged: " . . . after you gentlemen have considered all the evidence in this case, if you are satisfied from the evidence beyond a reasonable doubt that at the time these particular substantive offenses were committed, that is, the offenses charged in the first ten counts of this indictment if you are satisfied from the evidence beyond a reasonable doubt that the two defendants were in an unlawful conspiracy, as I have heretofore defined unlawful conspiracy to you, then you would have a right, if you found that to be true to your satisfaction beyond a reasonable doubt, to convict each of these defendants on all these substantive counts, provided the

Daniel relies on *United States* v. *Sall*, *supra*. That case held that participation in the conspiracy was not itself enough to sustain a conviction for the substantive offense even though it was committed in furtherance of the conspiracy. The court held that, in addition to evidence that the offense was in fact committed in furtherance of the conspiracy, evidence of direct participation in the commission of the subsantive offense or other evidence from which participation might fairly be inferred was necessary.

We take a different view. We have here a continuous conspiracy. There is here no evidence of the affirmative action on the part of Daniel which is necessary to establish his withdrawal from it. *Hyde* v. *United States*, 225 U. S. 347, 369. As stated in that case, "Having joined in an unlawful scheme, having constituted agents for its performance, scheme and agency to be continuous until full fruition be secured, until he does some act to disavow or defeat the purpose he is in no situation to claim the delay of the law. As the offense has not been terminated or accomplished, he is still offending. And we think, consciously offending, offending as certainly, as we have said, as at the first moment of his confederation, and consciously through every moment of its existence." *id.*, p. 369. And so long as the partnership in crime continues, the partners act for each other in carrying it forward. It is settled that "an overt act of one partner may be the act of all without any new agreement specifically directed to that act." *United States* v. *Kissel*, 218 U. S. 601, 608. Motive or intent may be proved by the acts or declarations of some of the conspirators in furtherance of the common objective. *Wiborg* v. *United States*, 163 U. S. 632, 657-658. A scheme to use the mails to defraud, which is joined in by more than one person, is a conspiracy. *Cochran* v. *United States*, 41 F. 2d 193, 199-200. Yet all members are responsible, though only one did the mailing. *Cochran* v. *United States*, *supra*; *Macketi* v. *United States*, 90 F. 2d 462, 464; *Baker* v. *United States*, 115 F. 2d 533, 540; *Blue* v. *United States*, 138 F. 2d 351, 359. The governing principle is the same when the substantive offense is committed by one of the conspirators in furtherance of the unlawful project. *Johnson* v.

---

acts referred to in the substantive counts were acts in furtherance of the unlawful conspiracy or object of the unlawful conspiracy, which you have found from the evidence existed". Daniel was not indicted as an aider or abettor (see Criminal Code, § 332, 18 U. S. C. 550), nor was his case submitted to the jury on that theory.

United States, 62 F. 2d 32, 34. The criminal intent to do the act is established by the formation of the conspiracy. Each conspirator instigated the commission of the crime. The unlawful agreement contemplated precisely what was done. It was formed for the purpose. The act done was in execution of the enterprise. The rule which holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle. That principle is recognized in the law of conspiracy when the overt act of one partner in crime is attributable to all. An overt act is an essential ingredient of the crime of conspiracy under § 37 of the Criminal Code, 18 U. S. C. § 88. If that can be supplied by the act of one conspirator, we fail to see why the same or other acts in furtherance of the conspiracy are likewise not attributable to the others for the purpose of holding them responsible for the substantive offense.

A different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement. But as we read this record, that is not this case.

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES.

No. 719.—October Term, 1945.

W. Daniel Pinkerton and Walter G. Pinkerton, Petitioners, *vs.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[June 10, 1946.]

Mr. Justice Rutledge, dissenting in part.

The judgment concerning Daniel Pinkerton should be reversed. In my opinion it is without precedent here and is a dangerous precedent to establish.

Daniel and Walter, who were brothers living near each other, were charged in several counts with substantive offenses, and then a conspiracy count was added naming those offenses as overt acts. The proof showed that Walter alone committed the substantive crimes. There was none to establish that Daniel participated in them, aided and abetted Walter in committing them, or knew that he had done so. Daniel in fact was in the penitentiary, under sentence for other crimes, when some of Walter's crimes were done.

There was evidence, however, to show that over several years Daniel and Walter had confederated to commit similar crimes concerned with unlawful possession, transportation, and dealing in whiskey, in fraud of the federal revenues. On this evidence both were convicted of conspiracy. Walter also was convicted on the substantive counts on the proof of his committing the crimes charged. Then, on that evidence without more than the proof of Daniel's criminal agreement with Walter and the latter's overt acts, which were also the substantive offenses charged, the court told the jury they could find Daniel guilty of those substantive offenses. They did so.

I think this ruling violates both the letter and the spirit of what Congress did when it separately defined the three classes of crime, namely, (1) completed substantive offenses,[1] (2) aiding,

[1] These of course comprehend the vast variety of offenses prescribed by federal law, conspiracies for accomplishing which may be charged under the catchall conspiracy statute, note 3.

abetting or counseling another to commit them,[2] and (3) conspiracy to commit them.[3] Not only does this ignore the distinctions Congress has prescribed shall be observed. It either convicts one man for another's crime or punishes the man convicted twice for the same offense.

The three types of offense are not identical. *Bolienbach v. United States*, 326 U. S. — (slip ~~opinion, p.~~ 3); *United States v. Sall*, 116 F. 2d 745. Nor are ~~these~~ their differences merely verbal. *Ibid.* The gist of conspiracy is the agreement; that of aiding, abetting or counseling is in consciously advising or assisting another to commit particular offenses, and thus becoming a party to them; that of substantive crime, going a step beyond mere aiding, abetting, counseling to completion of the offense.

These general differences are well understood. But when conspiracy has ripened into completed crime, or has advanced to the stage of aiding and abetting, it becomes easy to disregard their differences and loosely to treat one as identical with the other, that is, for every purpose except the most vital one of imposing sentence. And thus the substance, if not the technical effect, of double jeopardy or multiple punishment may be accomplished. Thus also may one be convicted of an offense not charged or proved against him, on evidence showing he committed another.

The old doctrine of merger of conspiracy in the substantive crime has not obtained here. But the dangers for abuse, which in part it sought to avoid, in applying the law of conspiracy have not altogether disappeared. Cf. *Kotteakos v. United States*, Nos. 457-458, decided today. There is some evidence that they may be increasing. The looseness with which the charge may be proved, the almost unlimited scope of vicarious responsibility for others' acts which follows once agreement is shown, the psychological advantages of such trials for securing convictions by attributing to one proof against another, these and other inducements require that the broad limits of discretion allowed to prosecuting officers in relation to such charges and trials be not expanded into new, wider and more dubious areas of choice. If the matter is not

[2] "Whoever directly commits, any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal." 18 U. S. C. § 332.

[3] "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than 2 years, or both." 18 U. S. C. § 88.

generally of constitutional proportions, it is one for the exercise of this Court's supervisory power over the modes of conducting federal criminal prosecutions within the rule of *McNabb* v. *United States*, 318 U. S. 332.

I think that power should be exercised in this case with respect to Daniel's conviction. If it does not violate the letter of constitutional right, it fractures the spirit. *United States* v. *Sall*, *supra*. I think the ruling in that case was right, and for the reasons stated.[4] It should be followed here. Daniel has been held guilty of the substantive crimes committed only by Walter, on proof that he did no more than conspire with him to commit offenses of the same general character. There was no evidence that he counseled, advised or had knowledge of those particular acts or offenses. There was, therefore, none that he aided, abetted or took part in them. There was only evidence sufficient to show that he had agreed with Walter at some past time to engage in such transactions generally. As to Daniel this was only evidence of conspiracy, not of substantive crime.

The court's theory seems to be that Daniel and Walter became general partners in crime by virtue of their agreement and because of that agreement without more on his part Daniel became criminally responsible as a principal for everything Walter did thereafter in the nature of a criminal offense of the general sort the agreement contemplated, so long as there was not clear evidence that Daniel had withdrawn from or revoked the agreement. Whether or not his commitment to the penitentiary had that effect, the result is a vicarious criminal responsibility as broad as, or broader than, the vicarious civil liability of a partner for acts done by a co-partner in the course of the firm's business.

Such analogies from private commercial law and the law of torts are dangerous, in my judgment, for transfer to the criminal field. See Sen. Rep. No. 163, 72d. Cong., 1st Sess., 20.

[4] In the substantially identical situation presented in the *Sall* case as to the indictment and the proof, the Government argued that the conviction on the substantive counts should stand because the proof that the accused had entered the conspiracy amounted to proof that he had "aided and abetted" the commission of the substantive crimes within the meaning of 18 U. S. C. § 550. The court rejected the idea, apparently now accepted here, that "aiding and abetting" and "conspiring" are, and are intended by Congress to be the same thing, differing only in the form of the descriptive words. But if that is the only difference, then conviction for both "offenses" on account of the same act is clearly double punishment.

Guilt there with us remains personal, not vicarious, for the more serious offenses. It should be kept so. The effect of Daniel's conviction in this case, to repeat, is either to attribute to him Walter's guilt or to punish him twice for the same offense, namely, agreeing with Walter to engage in crime. Without the agreement Daniel was guilty of no crime on this record. With it and no more, so far as his own conduct is concerned, he was guilty of two.

In another aspect of the case, this effect is thrown into even clearer light. The indictment here was filed after a prior one for conspiracy alone had been dismissed. This in turn came after petitioners had been tried, convicted and had been successful in securing reversal on appeal for errors in the charge. *Pinkerton* v. *United States*, 145 F. 2d 252. Following this reversal they were reindicted and tried in the present case. The Government now says, as to the plea of double jeopardy on this account (which the trial court overruled on demurrer), that the two indictments were for different conspiracies since the first one charged a different period of time as covered by the conspiracy; charged 16 as compared with 19 overt acts in the second; and an additional object was added in the latter, that is, intent to violate another section of the revenue act. In other words, there were two different conspiracies by virtue of these minute differences in the detail of the allegations. Hence, there was no double jeopardy by the second indictment.

But later, in support of the conviction here, relative to the bearing of the various statutes of limitations upon proof of the overt acts, charged also as substantive offenses, the Government points out that the earlier indictment was framed on the assumption that a three-year statute of limitations applied to the conspiracy as first charged and the convictions were reversed for failure of the trial court to instruct the jury on that basis. Then the District Attorney discovered the decision in *Braverman* v. *United States*, 317 U. S. 49, 54-55, and decided to revamp the indictment to include details making the six-year period applicable. He did so, and added the substantive counts because, so it is said, in the view that a six-year period applied he felt there were enough substantive offenses within that time which he could successfully prove to justify including them.

It would seem, from this history, that to sustain this conviction as against the plea of former jeopardy by virtue of the earlier

indictment and what followed, the Government stands, and must stand, upon the idea that two separate and distinct conspiracies were charged, one by the first and one by the later indictment. See *United States* v. *Oppenheimer*, 242 U. S. 85, 87-88. But to sustain Daniel's conviction for the substantive offenses, via the conspiracy route, there was only a single continuing conspiracy extending over the longer period, in the course of which Walter committed crimes, which were also overt acts, some of them running back of the period charged in the former indictment, others being the same but later acts which it had charged as overt acts against both.

For these now Daniel is held responsible, not merely as a conspirator, as the prior indictment charged, but as both a conspirator and a substantive offender.

What this lacks by way of being put twice in jeopardy for the same offense, I am unable to understand. For not only has Daniel been convicted for conspiracy, for the same overt acts, and illegal ends, as the first indictment charged. He has had those acts converted into substantive offenses. I do not think the prosecutor's technical, and it would seem insubstantial, variations in the details of the indictment should be permitted to achieve so much.[5]

This, of course, should not relieve Walter of the conviction for the substantive offenses. But his sentence for conspiracy should be annulled. So also should Daniel's sentence on all counts.

Mr. Justice FRANKFURTER, reserving judgment on the question of double jeopardy, agrees in substance with the views expressed in this dissent.

---

[5] The situation is essentially the same as when crimes are defined with such minute distinction as to make them different only in the most technical sense. See District of Columbia v. Buckley, 126 F. 2d 17, concurring opinion at 21; cf. Ex parte Nielsen, 131 U. S. 176; In re Snow, 120 U. S. 274.